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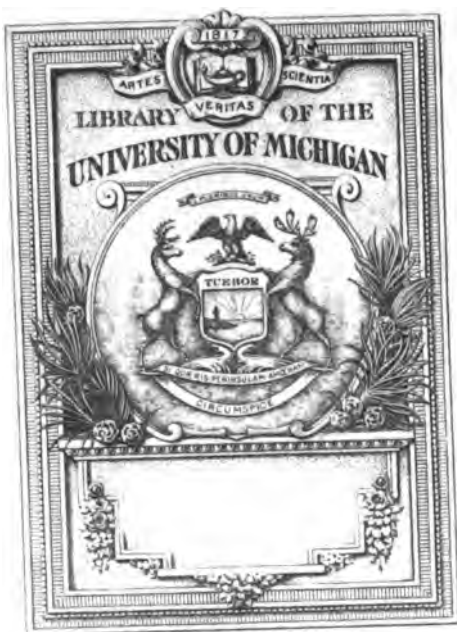
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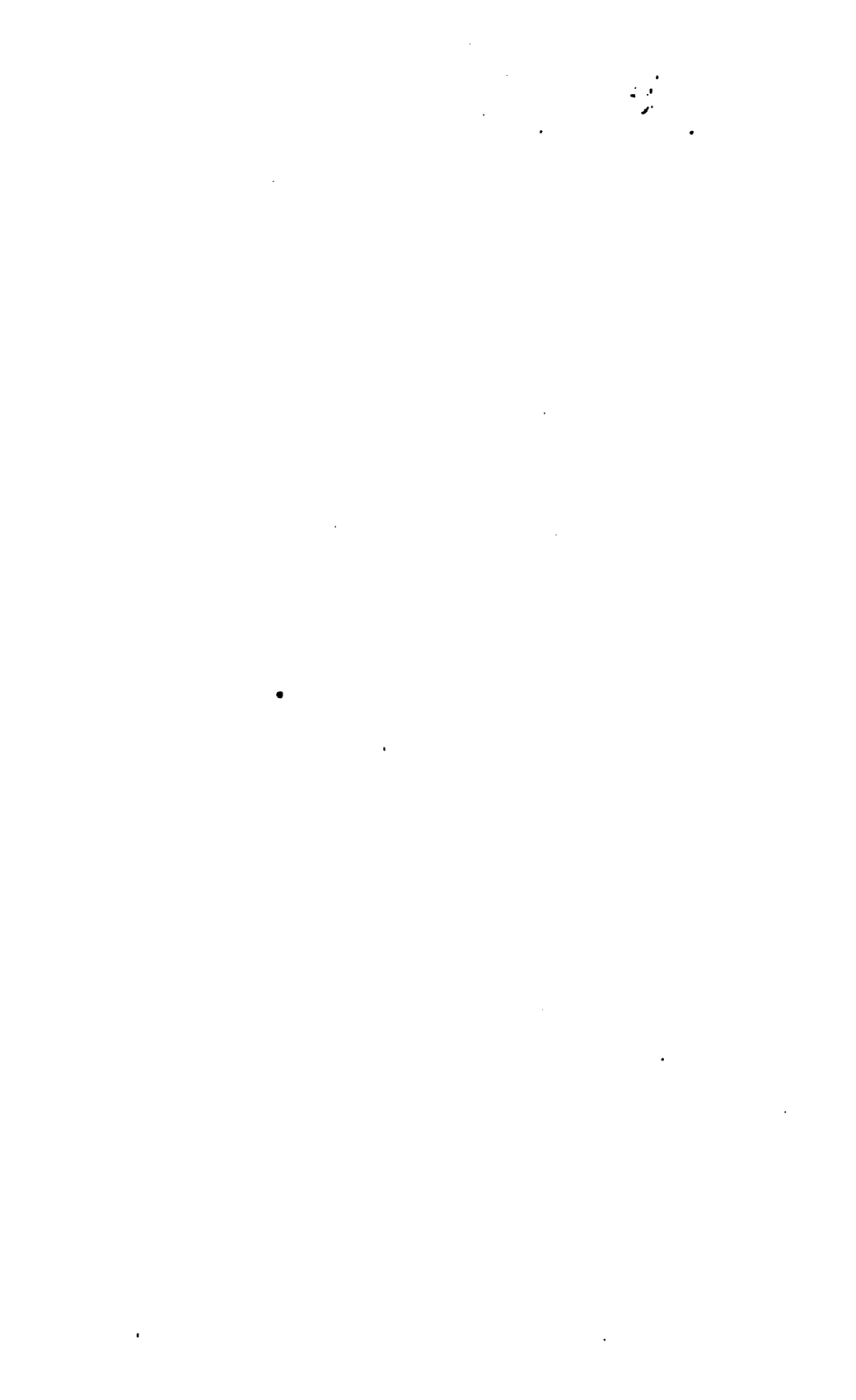
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N.Y. State
DEPARTMENT REPORTS

OF THE
STATE OF NEW YORK

CONTAINING THE
DECISIONS, OPINIONS AND RULINGS

OF THE
**State Officers, Departments, Boards
and Commissions**

AND
MESSAGES OF THE GOVERNOR

OFFICIAL EDITION
WILLIAM V. R. ERVING, Miscellaneous Reporter

VOLUME 14



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1918

40

INDEX

State officials	xiii
Legislature	xxiii

GOVERNOR'S MESSAGES

Annual Message, transmitted to the Legislature January 2, 1918.....	1
Budget estimate, transmitted to the Legislature January 9, 1918.....	25
Relative to proposed amendment to Federal Constitution; transmitted to the Legislature January 2, 1918.....	22

COURT OF CLAIMS

Beardsley, William J., v. State of New York, claim arising from the failure of the State to pay claimant, as superintending architect, for services rendered as such architect in connection with the proposed new prison on Bear Mountain and at Wingdale, No. 14609.....	39
Burt Olney Canning Company v. State of New York, claim arising from damages caused by flooding of claimant's canning factory near Durhamville, N. Y., No. 7328.....	97
Danes, Samuel A., and another, v. State of New York, claim arising from the appropriation by the State of uplands belonging to claimants lying between their remaining lands and the Mohawk river, No. 293-A....	93
Jones, David R., v. State of New York, claim arising from the appropriation by the State of a portion of a farm belonging to claimant for consequential damages and the flooding of the highway, No. 14694	101
Taggart Paper Company v. State of New York, claim arising from the appropriation of 11,897 acres of land in the Adirondack region, Herkimer county, owned by claimant, No. 10335.....	87

PUBLIC SERVICE COMMISSION

FIRST DISTRICT

Assets and Liabilities Association, Inc., Complaint of, against the New York Steam Company, as to refusal to provide service because of arrearages	129
Bleecker Street and Fulton Ferry Railroad Company, Application of, for approval by the Commission of a declaration of abandonment of portions of its route in the borough of Manhattan, city of New York..	167
Brooklyn Heights Railroad Company and certain other common carriers, Hearing on the application of the Commission as to whether the said corporations should be required to purchase or provide additional surface cars	144

Dry Dock, East Broadway and Battery Railroad Company, Application of, for consent of the Public Service Commission of the First District to make and issue its refunding mortgage and deed of trust to Central Trust Company of New York, as trustee, and to issue thereunder certain refunding bonds.....	137
Hishmeh & Rashid, Complaint of, against the New York Edison Company, in regard to alleged overcharge for electricity in the borough of Manhattan, city of New York.....	174
Long Island Railroad Company, New passenger tariffs of, containing certain changes in commutation fares, mileage ticket rates and one-way and round-trip fares and distances between stations.....	117
Mitchel, John Purroy, as Mayor of the city of New York, Complaint of, for a determination that the operation of the railroad on Central Park West by the New York Railways Company and the Eighth Avenue Railroad Company is dangerous and a menace to persons using Central Park West as a highway.....	149
New York and Queens County Railway Company and other traction companies, Hearing on motion of the Commission concerning regulations, practices, service, track equipment, terminal facilities, etc., of said companies	160
New York Edison Company, Complaint of Brill Bros. against, respecting bills for electric current supplied at premises at 1619 Broadway, borough of Manhattan, and the refusal of said company to refund certain price differences	104
New York Steam Company, Hearing on motion of the Commission to inquire and determine whether an order should be made directing said company to furnish service to applicants on Water street in the borough of Manhattan, city of New York.....	155
Presidential direction of railroad operation and national rehabilitation of railroad finances, effect of, upon the regulative powers of State Commissions	179
Street railroad corporations, Hearing on motion of the Commission concerning regulations, practices and service of, with regard to the operation of open cars in the spring and fall and in inclement weather.....	163
United States Fuel Administrator, Order of, as to electrical corporations, in relation to the generation and supply of electricity.....	115
Westcott Express Company, In the matter of rates, fares, charges, regulations, practices, equipment, appliances and service of.....	135

PUBLIC SERVICE COMMISSION

SECOND DISTRICT

Albany Southern Railroad Company, Petition of, for permission to construct an electric plant in the town of Greenport, Columbia county, and for approval of a local franchise therefor.....	390
Batavia, city of, In the matter of the petition of John J. Neil for a certificate of convenience and necessity for the operation of a stage route by auto buses in the said city, the proposed route to be operated between Batavia and the incorporated village of Avon, Livingston county	264

INDEX

v

	PAGE
Common carriers, in regard to less than carload shipments of freight; petition of C. C. McCain, joint agent of certain carriers, for modification of orders concerning.....	426
Common carriers, In the matter of the practices of, in the application of their tariffs relating to the furnishing of grain doors and bulkheads, and as to reasonableness of maximum allowance under such tariffs when lumber for grain doors or bulkheads is furnished by shipper....	284
Common carriers within the Second District, Petition of, from provisions of section 36 of the Public Service Commissions Law as amended, so as to permit certain changes in rates.....	207
Corning, town of, Steuben county, Petition of town board and superintendent of highways of, for a determination as to the manner in with Fenderson street in said town shall cross the railroad operated by the Delaware, Lackawanna and Western Railroad Company.....	412
Elizabethtown Terminal Railroad Company, Petition of Horace S. Homer for approval of a plan of reorganizing said company, to be called "Elizabethtown & Adirondacks Railroad Company, Inc.".....	277
Erie Railroad Company, Petition of, for authority to issue \$15,000,000 6 per cent series A bonds under its refunding and improvement mortgage dated December 1, 1916.....	301
Fredonia, village of, Complaint of Henry C. Drake, as president, against the New York Central Railroad Company, as to gates being provided and maintained at a certain crossing in said village.....	423
Groton Electric Power Corporation, Petition of, for permission to construct an electric plant in the towns of Dryden and Groton, and in the incorporated villages of Freeville and Dryden, Tompkins county, and for approval of local franchises therefor.....	421
Groton Electric Power Corporation, Petition of, for permission to construct an electric plant in the village of Groton, Tompkins county, and for approval of local franchise from said village.....	267
Huntington Railroad Company, Petition of, for permission to increase passenger fares	305
Ithaca Traction Corporation, Petition of, for permission to increase passenger fares	366
Jordan Electric Light and Power Company, Petition of, for permission to construct and for approval of franchise in municipalities of Onondaga county	242
Kingston Gas and Electric Company, Petition of, for authority to acquire all of the capital stock of Ulster Electric Light, Heat and Power Company and a majority of the capital stock of Upper Hudson Electric and Railroad Company	405
Lawrence Park Heat, Light and Power Company, Petition and supplemental petition of, for permission to construct in portions of the incorporated village of Bronxville an electric plant and a steam plant, and for approval of certain rights and privileges under franchises therefor received from said village.....	244
Lehigh Valley Railroad Company, Complaint of residents of Cato, Meridian and Fair Haven and the Auburn Chamber of Commerce against, as to the discontinuance of certain trains between Auburn and North Fair Haven	280

	PAGE
Long Island Railroad Company, Petition of, as to construction of a new connecting track between the Montauk Division and the Manorville branch	239
Mt. Vernon and Yonkers, cities of, the New York Railroad Company and the Bronx Parkway Commission, Joint petition for a modification of orders of this Commission relative to location, construction and design of an overgrade crossing of the New York and Harlem Railroad, lessor, extending from Broad street, Mt. Vernon, to Vermont avenue, Yonkers	400
New York Central and Hudson River Railroad Company, Petition of, for the elimination of grade crossings over the New York and Harlem Railroad in the city of White Plains.....	272
New York Central Railroad Company and the city of White Plains, Joint petition of, for a modification of the order of the Commission dated April 10, 1912, with respect to the location, construction and design of an overgrade crossing of the railroad near Tibbetts avenue, in the city of White Plains.....	272
New York Central Railroad Company, Application of, for authority to issue certain mortgage bonds amounting to \$10,000,000.....	220
New York Central Railroad Company, Application of, for leave to issue Series A of its 4½ per cent refunding and improvement mortgage bonds to the amount of \$10,000,000, and for other authority in connection therewith	220
New York Telephone Company, Complaint of subscribers in the town of Argyle, Washington county, against, as to toll charges and service....	225
Niagara Falls Gas and Electric Light Company, Petition of, for authority to make a mortgage for \$800,000 and to issue \$800,000 in bonds to be secured by said mortgage.....	201
Nickel Plate Connecting Railroad Corporation, Petition of, as to construction and exercise of franchises, and as to its railroad crossing highways and other railroads.....	297
Pitcairn, town of, St. Lawrence county, Petition of town board and superintendent of highways of, for a determination of how a new highway laid out in said town shall cross the Carthage and Adirondack branch of the New York Central Railroad.....	393
Schoharie Valley Light and Power Corporation, Petition of, for permission to construct an electric plant in portions of the counties of Schoharie and Schenectady, and for approval of local franchises.....	280
South Glens Falls, Complaint of trustees of village of, against United Gas, Electric Light and Fuel Company of Sandy Hill and Fort Edward, as to price of gas.....	417
Tracy, Samuel G., M. D., Complaint of, against New York Telephone Company, as to disputed number of calls; that itemized bills be furnished and as to coin-box telephone.....	210

EDUCATION DEPARTMENT

Allen, Lucy B., Appeal of, from a resolution of the board of education of the city of New York authorizing her transfer from the New York Training School for Teachers to a high school.....	465
--	-----

	PAGE
Andrews, Alfred M., Appeal of, relative to indorsement of his teacher's certificate by the district superintendent of the Third Supervisory District of Herkimer county.....	445
Bowen, Frances, Appeal of, from determination of State Teachers' Retirement Fund Board rejecting her application for retirement.....	489
Carpenter, Cora A., Appeal of, from determination of State Teachers' Retirement Fund Board upon her application for retirement.....	485
Freetown, town of, Cortland county, In the matter of the appeals of certain trustees from an order made by Claude D. Carter, district superintendent of schools, dissolving certain school districts of.....	482
Heywood, Myrtle Corbett, Appeal of, from action of the board of examiners of the city of New York in refusing to issue to her a teacher's license	455
Lynd, Margaret L., Appeal of, against the board of education of the city of New York, in regard to refusal of such board to grant her a license as a principal of an elementary school.....	449
Port Jervis, city of, Orange county, In the matter of the board of education of union free school district No. 1, town of Deerpark, comprising the said city and constituting the city school district of Port Jervis, as to authority of the mayor to make certain appointments.....	434
Richardson, Arnold L., Appeal of, from the proceedings of the board of education of unit No. 2, town of Stamford, Delaware county, N. Y.....	452
Sheeley, Elisha, Appeal of, from proceedings of a special school meeting held in district No. 9, town of Neversink, Sullivan county, designating a school-house site.....	431
Stetson, Arthur D., Appeal of, against the board of education of the city of New York.....	472
Verona, town of, Oneida county, In the matter of the division of said town into school units.....	462

ATTORNEY-GENERAL

Banking Law and Business Corporations Law, In the matter of construing the provisions of, as to investment companies.....	518
Civil Service Law, In the matter of construing section 21-a, in relation to pensions for honorably discharged veterans of the Civil War who for ten consecutive years or upwards, immediately preceding their attaining the age of seventy years, have been employed in seasonal work upon the canal.....	523
Federal food administration, Legality of applying a State appropriation to carry out, and as to the limitation on such expenditures.....	498
Judiciary Law, sections 466, 468, 470, In the matter of construing in connection with the Court of Appeals rules and the Constitution, as to the right of an American woman, who becomes an alien by marriage, to practice in the courts of this State.....	506
Military Law, In the matter of construing section 14, as amended and renumbered, in reference to a provision of such law that the Articles of War of the United States army shall be in force at all times as to the land and naval forces of the State in so far as consistent with the Military Law and the regulations issued thereunder.....	527

	PAGE
Tax Law, chapter 726, Laws of 1917, In the matter of construing, as to exemption of personal property of certain corporations from taxation for local school purposes.....	508
Tax Law, In the matter of construing section 4, subdivision 5 of, as to exemption from taxation of real property owned by a pensioner, and purchased with the proceeds arising from the sale of another piece of property	495
Tax Law, In the matter of construing section 205 of article IX of, as to bonds held by a public service water corporation upon which corporation taxes have been paid but not investment taxes, and as to whether section 336 of article XV of said law applies.....	401
Women voters, In the matter of construing chapter 2534 of the United States Statutes and article II, section 1 of the State Constitution, as to qualifications of	520

COMPTROLLER

Appraisal of estates, In the matter of, where there are additional taxes on investments in certain cases under the Taxable Transfer Law.....	531
State Comptroller, In the matter of the general scope of the official duties of	538
Tax Law, In the matter of the provisions of section 221-b of, for an additional tax under the Taxable Transfer Act in certain cases.....	535

STATE INDUSTRIAL COMMISSION

Barnes, Hannah M., Widow, for the death of Henry W. Barnes, v. Alexander Utrecht, Employer; Fidelity and Casualty Company of New York, Insurance Carrier.....	675
Blattner, August, v. Pa Pro Company, Employer; Utica Mutual Compensation Insurance Company, Insurance Carrier.....	660
Boslee, George, v. Semon Bache & Co., Employer; Travelers' Insurance Company, Insurance Carrier.....	607
Cameron, Myra B. and Sarah, Alleged Widows, for the death of William Cameron, v. Acheson Graphite Company, Employer; Utica Mutual Compensation Insurance Corporation, Insurance Carrier.....	683
Carlson, Harry, v. J. Edward Ogdens Co., Inc., Employer; State Insurance Fund, Insurance Carrier.....	655
Carman, Frances A., Widow, for death of William R. Carman, v. Loper Brothers, Employer; Lumber Mutual Casualty Insurance Company, Insurance Carrier	727
Casterline, Edward, v. James P. Gillen, Employer; Fidelity and Casualty Company, Insurance Carrier.....	610
Champion, Susan, Mother, for death of Harold Ray Effingham, v. New York and New Jersey Steamboat Company, Employer; Employers' Liability Assurance Corporation, Insurance Carrier.....	623
Charvat, Frank C., v. George G. Wilson & Co., Inc., Employer; Globe Indemnity Company, Insurance Carrier.....	555

Cohen, Morris, v. Joseph Berman, Employer; Southwestern Surety Company, Insurance Carrier.....	599
Connolly, Raymond J., v. Tucker Electrical Construction Company, Employer; The Exchange Mutual Indemnity Insurance Company and Zurich General Accident Insurance Company, Insurance Carriers.....	716
Coons, Lottie, Widow, for death of Bernard Coons, v. Endicott Johnson & Company, Employer; Employers' Liability Assurance Corporation, Insurance Carrier	565
Coopersmith, Abraham, v. Silverstein & Wallin, Employer; Globe Indemnity Company, Insurance Carrier.....	613
Crawford, Martin, v. New York Consolidated Railroad Company, Self Insurer	606
Cutter, Frank H., v. C. T. Snavlin, Employer; United States Casualty Company, Insurance Carrier.....	547
Dalecky, Antonia Borger, for death of Antonio Dalecky, v. Isidor Berkowitz, Employer; Employers' Liability Insurance Corporation, Insurance Carrier	706
Daly, Annie, v. Bates & Roberts, Employers; Frankfort General Insurance Company, Insurance Carrier.....	618
Divots, Charles, v. George G. Wilson & Co., Inc., Employer; Globe Indemnity Company, Insurance Carrier.....	555
Dvorek, Frank, v. George G. Wilson & Co., Inc., Employer; Globe Indemnity Company, Insurance Carrier.....	556
Edwards, Charles M., v. Havens & Wilde, Employer; Aetna Life Insurance Company, Insurance Carrier.....	594
Elms, Lillian C., Widow, for death of Simeon Elms, v. Buffalo Meter Company, Employer; American Mutual Compensation Insurance Company, Insurance Carrier.....	576
Friedman, Anna, Daughter, and Others, for death of Abraham Friedman, v. R. & F. Realty Corporation, Employer; Zurich General Accident and Liability Assurance Corporation, Insurance Carrier.....	551
Frohder, Raymond, v. David Van Gelder, Employer; Zurich General Accident and Liability Insurance Company, Insurance Carrier.....	573
Gandy, Rosie, Widow, for death of Frank Gandy, v. Bass Holding Company, Employer; Commercial Casualty Company, Insurance Carrier..	561
Grubesich, Maria, for the death of Max Grubesich, v. Valley Mills Company, Employer; Fidelity and Casualty Company, Insurance Carrier..	666
Hernon, William and Margaret, Father and Mother, for death of Edward J. Hernon, v. William L. Holihan, Employer; London Guarantee and Accident Insurance Company, Insurance Carrier.....	597
Hudec, Eni, Widow, and Others, for death of Wendelin Hudec, v. George G. Wilson & Co., Inc., Employer; Globe Indemnity Company, Insurance Carrier	555
Hungerford, Edwin B., v. Samuel Bonn, Employer; Standard Accident Insurance Company, Insurance Carrier.....	720
Iron Steamboat Company of New Jersey. Application of, for the return to said company of certain premiums paid by it into the State Insurance Fund	634

	PAGE
Kavanaugh, Edward, v. Harris Wolf, Employer; Zurich General Accident and Liability Insurance Company, Insurance Carrier.....	648
Lambertson, George W., Jr., Son, for the death of George W. Lambertson, v. Orange County Traction Company, Employer; Travelers' Insurance Company, Insurance Carrier.....	646
Lanigan, Mary, Widow, for death of James F. Lanigan, v. Standard Shipbuilding Corporation, Employer; Aetna Life Insurance Company, Insurance Carrier	623
Leczowski, Carl, v. T. LaFave & Bellinger, Employer; London Guarantee and Accident Company, Insurance Carrier.....	701
Leesman, Jennie, Widow, for the death of her husband, v. Drew Brothers, Incorporated, Employer; United States Casualty Company, Insurance Carrier	679
Levine, Max, v. Max I. Gold's Sons, Employer.....	691
Litts, May D., for death of Burt Litts, v. Risley Lumber Company, Employer; Travelers' Insurance Company, Insurance Carrier.....	714
Luka, Samuel, v. Louis Schulman, Employer; Aetna Life Insurance Company, Insurance Carrier.....	580
McCracken, Marie E., Mother, for the death of William McCracken, v. Eastern Gravel Corporation, Employer; London Guarantee and Accident Company, Ltd., Insurance Carrier.....	659
Mark, Moe, v. Joseph Berman, Employer; Southwestern Surety Company, Insurance Carrier	599
Moran, Nora, Widow, for death of Martin Moran, v. International Elevating Company, Employer; Globe Indemnity Company, Insurance Carrier.	623
New Jersey Navigation Company, Application of, for the return to said company of all premiums paid by it into the State Insurance Fund..	634
O'Esau, John M., v. E. W. Bliss Company, Employer; Aetna Life Insurance Company, Insurance Carrier.....	696
Phelan, Clarence H., v. E. W. Bliss Company, Employer; Aetna Life Insurance Company, Insurance Carrier.....	585
Reddy, Patrick, v. National Excavating and Foundation Company, Inc., Employer; Fidelity and Deposit Company of Maryland, Insurance Carrier	602
Remington, Eva Potter, Mother, for death of Frederick Remington, v. Briggs Bros. & Co., Employer; London and Lancashire Indemnity Company of America, Insurance Carrier.....	558
Ridout, Henry W., v. Rodgers & Haggerty, Employer and Insurance Carrier	710
Scott, Anna, Widow, for the death of Robert B. Scott, v. Lewis R. Grant, Employer; Travelers' Insurance Company, Insurance Carrier.....	651
Shanley, James, v. American Sugar Refining Company, Employer; Employers' Liability Assurance Corporation, Insurance Carrier.....	623
Siersted, Harry, v. Leinhos, Engelke & Bock, Employers; Hartford Accident Insurance Company, Insurance Carrier.....	704
Stagurnos, Ekaterini, Mother, for the death of James Stagurnos, v. Tunnessassa Lumber Company, Employer; Fidelity and Casualty Company, Insurance Carrier.....	687

INDEX

xi

	PAGE.
Stein, Alex, v. Bright Star Battery Company, Employer; Travelers' Insurance Company, Insurance Carrier.....	590
Sullivan, Hannah, Widow, for the death of Michael Sullivan, v. Industrial Engineering Company, Employer; Casualty Company of America, Insurance Carrier	642
Tucillo, Ermelinda, Widow, for death of John Tucillo, v. Ward Baking Company, Employer; Ocean Accident and Guarantee Company, Insurance Carrier	568
Worf, Selma, for death of George A. Worf, v. Phœnix Sand and Gravel Company, Employer; Travelers' Insurance Company, Insurance Carrier.	570

STATE OFFICIALS

xiii

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Corrected to date

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1918

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Chief Clerk and Auditor.....	Wellington D. Ives.
Statistician.....	Mrs. Ellen L. Tenney.
Superintendent, Division of Dependent Children.....	James H. Foster.
Superintendent, Division of Adult Wards....	Robert W. Hill.
Superintendent, Division of Mental Defect and Delinquency.....	Chester L. Carlisle, M. D.
Superintendent, Division of Medical Charities	Clarence E. Ford.
Superintendent of Inspection.....	Richard W. Wallace.

CIVIL SERVICE, STATE COMMISSION

Commissioner.....	John C. Clark, President.
Commissioner.....	Willard D. McKinstry.
Commissioner.....	William Gorham Rice.
Secretary.....	John C. Birdseye.
Assistant Secretary.....	George R. Hitchcock.
Chief Examiner.....	Harold N. Saxton.

CLAIMS, COURT OF

Presiding Judge.....	Fred M. Ackerson.
Judge.....	William W. Webb.
Judge.....	Sanford W. Smith.
Judge.....	Charles R. Paris.
Judge.....	William D. Cunningham.
Clerk.....	Frederick D. Colson.

CONSERVATION, DEPARTMENT OF

Commissioner.....	George D. Pratt.
Deputy Commissioner.....	Alexander Macdonald.
Secretary.....	Augustus S. Houghton.
Assistant Secretary.....	John J. Farrell.

BUREAU OF MARINE FISHERIES (New York office Conservation Commission, Times Building, Times Square).

Supervisor.....	Emmett B. Hawkins.
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EXCISE, STATE COMMISSIONER OF.....

Deputy Commissioner.....	Herbert S. Sisson.
Deputy Commissioner.....	Jay Farrier.
Second Deputy Commissioner.....	Clarence W. Davidson.
Third Deputy Commissioner.....	Charles V. Platt.
Chief Counsel.....	Harry D. Sanders.
Confidential Clerk.....	Frederick T. Cardoze.

FISCAL SUPERVISOR OF STATE CHARITIES.....

Deputy.....	Frank R. Utter.
Deputy.....	Henry O'Brien.
Second Deputy.....	Thomas H. Lee.
Chief Clerk.....	Fred Dakin.

HEALTH, STATE DEPARTMENT OF

Commissioner.....	Hermann M. Biggs, M. D.
Deputy Commissioner.....	Matthias Nicoll, Jr., M. D.
Secretary.....	John A. Smith, M. D.
Executive Clerk.....	F. D. Beagle.

HIGHWAY DEPARTMENT

Commissioner of Highways.....	Edwin Duffey.
First Deputy.....	H. Eltinge Breed.
Second Deputy.....	Fred W. Sarr.
Third Deputy.....	B. J. Rice.
Secretary.....	Irving J. Morris.
Auditor.....	S. D. Gilbert.

INSURANCE DEPARTMENT

Superintendent of Insurance.....	James S. Phillips.
First Deputy.....	Henry D. Appleton.
Second Deputy (New York office, 165 Broadway).....	Francis R. Stoddard, Jr.
Chief Clerk.....	Edwin M. Cadman.
Statistician.....	Charles S. Crippen.
Actuary.....	Vacant.
Counsel.....	Hervey J. Drake.
Bureau Chiefs:	
Assessment and Fraternal Corporations...	Thomas F. Behan.
Co-operative Fire.....	George E. Merigold.
Liquidation Bureau.....	C. C. Fowler.
Fire Companies (New York office, 165 Broadway).....	Daniel F. Gordon.
Life Companies (New York office, 165 Broadway).....	Nelson B. Hadley.
Casualty Companies (New York office, 165 Broadway).....	Arthur F. Saxton.
Fraternal Companies (New York office, 165 Broadway).....	John E. Diefendorf.
Workmen's Compensation (New York office, 165 Broadway).....	H. E. Ryan.
Audit (New York office, 165 Broadway)...	Charles Hughes.
Underwriters' Association (New York office, 165 Broadway).....	Samuel Deutschberger.

LABOR, DEPARTMENT OF (Administered by State Industrial Commission)

Chairman.....	John Mitchell.
Commissioner.....	James M. Lynch.
Commissioner.....	Louis Wiard.
Commissioner.....	Edward P. Lyon.
Commissioner.....	Henry D. Sayer.
Secretary.....	William S. Coffey.
Assistant Secretary.....	Victor T. Holland.
First Deputy Commissioner in charge of Bureau of Inspection.....	James L. Gernon.
Second Deputy Commissioner in charge of Workmen's Compensation Bureau.....	William C. Archer.

LABOR, DEPARTMENT OF — (Continued).

Third Deputy Commissioner in charge of Mediation and Arbitration Bureau.....	Frank B. Thorn.
Chief Counsel.....	Robert W. Bonyngs.
Chief Statistician.....	Leonard W. Hatch.
Director Employment Bureau.....	Charles B. Barnes.
Manager, State Insurance Fund.....	F. Spencer Baldwin.

LAW EXAMINERS, BOARD OF

Examiner.....	William P. Goodelle, President.
Examiner.....	Franklin M. Danaher, Secretary and Treasurer.
Examiner.....	Frank Sullivan Smith.

MILITARY TRAINING COMMISSION

Commissioner.....	John F. O'Ryan, Maj.-Gen. Com- manding the National Guard, State of New York.
Commissioner.....	Dr. John H. Finley, President of University of the State of New York.
Commissioner.....	Dr. George J. Fisher.
Secretary.....	Thomas C. Stowell.
Military Secretary.....	Capt. Henry C. Perley.
State Inspector of Physical Training.....	Thomas A. Storey.
Supervising Officer of Military Training.....	Col. William H. Chapin
Supervising Officer of Vocational Training...	Arthur D. Dean.
Clerk.....	Robert C. Mabel.

PRISONS, STATE COMMISSION OF

Commissioner.....	Henry Solomon, President.
Commissioner.....	Frank E. Wade, Vice-President.
Commissioner.....	Mrs. Sarah L. Davenport.
Commissioner.....	Vacant.
Commissioner.....	Allan I. Holloway.
Commissioner.....	John S. Kennedy.
Commissioner.....	Mial H. Pierce.
Secretary.....	John F. Tremain.
Chief Clerk.....	Philip G. Roosa.

PRISONS, STATE SUPERINTENDENT OF.....

Chief Clerk.....	George W. Franklin.
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PUBLIC BUILDINGS, SUPERINTENDENT OF.....

Deputy Superintendent.....	Frank Lowe.
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PUBLIC SERVICE COMMISSION, FIRST DISTRICT, 120 Broadway, New York City

Commissioner.....	Oscar S. Straus, Chairman.
Commissioner.....	Travis H. Whitney.
Commissioner.....	Charles S. Hervey.
Commissioner.....	Frederick J. H. Kracke.
Commissioner.....	Charles Bulkley Hubbell.
Counsel.....	William L. Ransom.
Secretary.....	James Blaine Walker.

PUBLIC SERVICE COMMISSION, SECOND DISTRICT

Commissioner	Charles B. Hill, Chairman.
Commissioner	Frank Irvine.
Commissioner	John A. Barhite.
Commissioner	Thomas F. Fennell.
Commissioner	Vacant.
Counsel	Ledyard P. Hale.
Secretary	Francis X. Disney.

PUBLIC WORKS, SUPERINTENDENT OF William W. Wotherspoon.

Deputy Superintendent	Henry D. Alexander.
Assistant Deputy and Chief Clerk	Alfred M. O'Neill.
Special Examiner and Appraiser and Claims Agent	Matthew A. Heeran.

REPORTERS

Court of Appeals	J. Newton Fiero.
Deputy	Alva S. Newcomb.
Supreme Court	Jerome B. Fisher.
Deputy	Fletcher W. Battershall.
Miscellaneous	William V. R. Erving.

STATE CONSTABULARY

Superintendent	George Fletcher Chandler.
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STATE FAIR COMMISSION

Commissioner	Charles A. Wieting.
Commissioner	Edward B. Long.
Commissioner	Henry K. Williams.
Commissioner	Pierre Lorillard, Jr.
Commissioner	Fred B. Parker.
Commissioner (<i>ex officio</i>)	Edward Schoeneck, Lieut.-Gov.
Commissioner (<i>ex officio</i>)	Charles S. Wilson, Commissioner of Agriculture.

STATE HOSPITAL COMMISSION

Commissioner	Charles W. Pilgrim, M. D., Chairman.
Commissioner	Andrew D. Morgan.
Commissioner	Frederick A. Higgins.
Secretary	Everett S. Elwood.
Assistant Secretary	Lewis M. Farrington.

STATE PROBATION COMMISSION Frank E. Wade, President.

Commissioner	Edmund J. Butler, Vice-Pres.
Commissioner	Alphonso T. Clearwater.
Commissioner	Edward C. Blum.
Commissioner	Maude E. Miner.
Commissioner	Henry Marquand.
Commissioner	John Huston Finley, <i>ex officio</i> .
Secretary	Charles L. Chute.

STATE TAX COMMISSIONERS

Commissioner.....	Walter H. Knapp, President
Commissioner.....	Ralph W. Thomas.
Commissioner.....	John J. Merrill.
Secretary.....	Horace G. Tennant
Counsel.....	William E. Sill.

UNIVERSITY OF THE STATE OF NEW YORK

REGENTS, BOARD OF

Chancellor.....	Pliny T. Sexton, LL.B., LL.D., Palmyra.
Vice-Chancellor.....	Albert Vander Veer, M.D., M.A., Ph.D., LL.D., Albany.
Regent.....	Chester S. Lord, M.A., LL.D., Brooklyn.
Regent.....	William Nottingham, M.A., Ph.D., LL.D., Syracuse.
Regent.....	Francis M. Carpenter, Mount Kisco.
Regent.....	Abram I. Elkus, LL.B., D.C.L., New York.
Regent.....	Adelbert Moot, Buffalo.
Regent.....	C. B. Alexander, M.A., LL.B., LL.D., Lit.D., New York.
Regent.....	John Moore, Elmira.
Regent.....	Walter Guest Kellogg, B.A., Ogdensburg.
Regent.....	James Byrne, New York.
Regent.....	Herbert L. Bridgman, M.A., Brooklyn.

COMMISSIONER OF EDUCATION..... John H. Finley.

Deputy Commissioner.....	Thomas E. Finegan.
Assistant Commissioner for Higher Education.....	Augustus S. Downing.
Assistant Commissioner for Secondary Education.....	Charles F. Wheelock.
Director of State Library.....	James I. Wyer, Jr.
Director of Science and State Museum.....	John M. Clarke.
Counsel.....	Frank B. Gilbert.

Chiefs of Divisions:

Administration Division.....	Hiram C. Case.
Attendance Division.....	James D. Sullivan.
Education Extension Division.....	William R. Watson.
Examinations and Inspections Division.....	George M. Wiley.
Archives and History Division.....	J. Sullivan (Director).
Division of School Buildings.....	Frank H. Wood.
Library School Division.....	Frank K. Walter.
School Library Division.....	Sherman Williams.
Statistical Division.....	Clark W. Halliday.
Visual Instruction Division.....	Alfred W. Abrams.
Department of Agricultural and Industrial Education.....	L. A. Wilson (Director).

THE LEGISLATURE

xxiii

SENATORS 1918

With Politics, Occupation and Post-Office Address of Each

HON. EDWARD SCHOENECK, *Lieutenant-Governor and President of the Senate, Syracuse, N. Y.*
Home Post-office, 431 Union Bldg., Syracuse, N. Y.

ELON R. BROWN, *Temporary President, Albany, N. Y. Home Post-office, Watertown, N. Y.*

ERNEST A. FAY, *Clerk, Albany, N. Y. Home Post-office, Potsdam, N. Y.*

Dist.	NAMES	POLITICS	OCCUPATION	POST-OFFICE ADDRESS
1.	George L. Thompson.....	Republican	Merchant.	Kings Park, N. Y.
2.	August E. Farrenkopf.....	Democrat.	Electrical engineer	1868 Madison st., Ridge-wood, L. I.
3.	Thomas H. Cullen.....	Democrat.	Marine insurance.	256 President st., Brooklyn.
4.	Charles C. Lockwood.....	Republican	Lawyer.	954 Greene ave., Brooklyn.
5.	William J. Heffernan.....	Democrat.	Real estate.	598 4th ave., Brooklyn.
6.	Charles F. Murphy.....	Republican	Lawyer.	292 Clinton ave., Brooklyn.
7.	Daniel F. Carroll.....	Democrat.	Manufacturer.	135 North 3rd st., Brooklyn.
8.	Alvah W. Burlingame, Jr.....	Republican	Lawyer.	391 Fulton st., Brooklyn.
9.	Robert R. Lawson.....	Republican	Lawyer.	24 Woodbine st., Brooklyn.
10.	Alfred J. Gilchrist.....	Republican	Lawyer.	294 Ridgewood ave., Bklyn.
11.	Bernard Downing.....	Democrat.	Stenographer.	195 Monroe st., N. Y. City.
12.	Jacob Koenig.....	Democrat.	Democrat.	220 E. 12th st., N. Y. City.
13.	James J. Walker.....	Democrat.	Lawyer.	6 St. Luke's pl., N. Y. City.
14.	James A. Foley.....	Democrat.	Lawyer.	66 Broadway, N. Y. City.
15.	John J. Boylan.....	Democrat.	Real estate appraiser.	418 W. 51st st., N. Y. City.
16.	Robert F. Wagner.....	Democrat.	Lawyer.	244 E. 86th st., N. Y. City.
17.	Courtlandt Nicoll.....	Republican	Lawyer.	340 Lexington ave., N. Y.
18.	Albert Ottinger.....	Republican	Lawyer.	165 Broadway, N. Y. City.
19.	Edward J. Dowling.....	Democrat.	Lawyer.	120 Broadway, N. Y. City.
20.	Salvatore A. Cotillo.....	Democrat.	Lawyer.	235 E. 116th st., N. Y. City.
21.	John J. Dunnigan.....	Democrat.	Architect and builder.	1891 Holland ave., N. Y. City.
22.	John V. Sheridan.....	Democrat.	Lawyer.	3118 Webster ave., N. Y. City.
23.	George Cromwell.....	Republican.	Lawyer.	Dongan Hills, Richmond Co., N. Y.
24.	George A. Slater.....	Republican.	Lawyer.	Port Chester, N. Y.
25.	John D. Stivers.....	Republican.	Editor and publisher.	Middletown, N. Y.
26.	James E. Townner.....	Republican.	Real estate.	Towners, N. Y.
27.	Charles W. Walton.....	Republican.	Lawyer.	Kingston, N. Y.
28.	Henry M. Sage.....	Republican.	Land and timber busi-ness	Menands, N. Y.
29.	George B. Wellington.....	Republican.	Lawyer.	3 Walnut place, Troy, N. Y.
30.	George H. Whitney.....	Republican.	Pharmacist.	113 No. 2nd ave., Mechanic-ville, N. Y.
31.	James W. Yelverton.....	Republican.	Banker.	217 Union st., Schenectady, N. Y.
32.	Theodore Douglas Robinson	Republican.	Farmer.	Mohawk, R. F. D. 1.
33.	James A. Emerson.....	Republican.	Banker.	Warrensburg, N. Y.
34.	N. Monroe Marshall.....	Republican.	Banker.	Malone, Franklin Co., N. Y.
35.	Elon R. Brown.....	Republican.	Lawyer.	124 Clinton st., Watertown, N. Y.
36.	Charles W. Wicks.....	Republican.	Farmer.	Sauquoit, Oneida Co., N. Y.
37.	Adon P. Brown.....	Republican.	Lawyer.	Leonardsville, N. Y.
38.	J. Henry Walters.....	Republican.	Lawyer.	935 University Block, Syra-cuse, N. Y.
39.	William H. Hill.....	Republican.	Editor and publisher.	Johnson City, N. Y.
40.	Charles J. Hewitt.....	Republican.	Banker.	Locke, N. Y.
41.	Morris S. Halliday.....	Republica.	Lawyer.	510 East Seneca st., Ithaca, N. Y.
42.	William A. Carson.....	Republican.	Retired merchant.	Rushville, Yates Co., N. Y.
43.	Charles D. Newton.....	Republican.	Lawyer.	Geneseo, Livingston Co., N. Y.
44.	John Knight.....	Republican.	Lawyer.	Arcade, Wyoming Co., N. Y.
45.	George F. Argetsinger.....	Republican.	Manufacturer.	683 Averill ave., Rochester, N. Y.
46.	John B. Mullan.....	Republican.	Insurance.	9 Elwood Bldg., Rochester, N. Y.
47.	George F. Thompson.....	Republican.	Lawyer.	Middleport, Niagara Co., N. Y.
48.	Ross Graves.....	Republican.	Insurance.	683 Manchester pl., Buffalo, N. Y.
49.	Samuel J. Ramsperger.....	Democrat.	Bookkeeper.	232 Emslie st., Buffalo, N. Y.
50.	Leonard W. H. Gibbs.....	Republican.	Lawyer.	110 Franklin st., Buffalo, N. Y.
51.	J. Samuel Fowler.....	Republican.	Lawyer.	Jamestown.

MEMBERS OF ASSEMBLY, 1918

With Politics, Occupation and Post-Office Address of Each

THADDEUS C. SWEET, *Speaker, Albany, N. Y. Home Post-office, Phoenix, N. Y.*
FRED W. HAMMOND, *Clerk, Albany, N. Y. Home Post-office, Syracuse, N. Y.*

Dist.	NAME	POLITICS	OCCUPATION	POST-OFFICE ADDRESS
ALBANY				
1	Clarence F. Welsh.....	Republican.	Certified shorthand reporter.....	43 So. Allen st., Albany.
2	John G. Malone.....	Republican.	Electrical contractor...	25 Howard st., Albany.
3	James M. Gaffers.....	Republican.	Farmer.....	Cohoes, R. F. D.
ALLEGANY				
	William Duke, Jr.....	Republican.	Real estate and oil producer.....	Wellsville.
BRONX				
1	Earl H. Miller.....	Democrat.	Wholesale lumber.....	834 Eagle ave., N. Y. City.
2	Edward J. Flynn.....	Democrat.	Lawyer.....	529 Courtlandt ave., N. Y. City.
3	Benjamin Gitlow.....	Socialist.	Novelty business.....	791 Forest ave., N. Y. City.
4	Samuel Orr.....	Socialist.	Lawyer.....	833 E. 167th st., N. Y. City.
5	Charles B. Garinkel.....	Democrat.	Salesman of print paper.....	1343 Prospect ave., N. Y. City.
6	Thomas J. McDonald.....	Democrat.	Newspaperman.....	876 E. 224th st., N. Y. City.
7	Joseph V. McKee.....	Democrat.	Instructor.....	890 E. 176th st., N. Y. City.
8	J. Fairfax McLaughlin.....	Democrat.	Lawyer.....	251 E. 200th st., N. Y. City.
BROOME				
1	Edmund B. Jenks.....	Republican.	Lawyer.....	Whitney Point.
2	Forman E. Whitcomb.....	Republican.	Shoemaker.....	Union.
CATTARAUGUS				
	DeHart H. Ames.....	Republican.	Real estate and loans..	Franklinville.
CAYUGA				
	L. Ford Hager.....	Rep.-Proh..	Farmer.....	Red Creek.
CHAUTAUQUA				
1	Hermes L. Ames.....	Republican.	Hay buyer.....	Falconer.
2	Joseph A. McGinnies.....	Republican.	Mgr. Chautauqua and Erie Grape Co.....	Ripley.
CHEMUNG				
	John J. Richford.....	Rep.-Proh..	Merchant.....	705 W. Gray st., Elmira.
CHENANGO				
	Bert Lord.....	Republican.	Merchant.....	Afton.
CLINTON				
	Wallace E. Pierce.....	Republican.	Lawyer.....	Plattsburgh.
COLUMBIA				
	William J. Alvord.....	Republican.	Freighter.....	Columbiaville.
CORTLAND				
	George H. Wiltsie.....	Republican.	Dry goods merchant...	Cortland.
DELAWARE				
	James C. Nesbitt.....	Ind.....	Farmer.....	Bloomville.
DUTCHESS				
1	James C. Allen.....	Republican.	Farmer.....	Clinton Corners.
2	Frank L. Gardner.....	Republican.	Insurance.....	Poughkeepsie.
ERIE				
1	Alexander Taylor.....	Republican.	Lawyer.....	115 Franklin st., Buffalo.
2	John W. Slater.....	Republican.	Insurance.....	1010 White Bldg., Buffalo.
3	Nicholas J. Miller.....	Republican.	Basket manufacturer..	12 Cayuga st., Buffalo.

MEMBERS OF ASSEMBLY — (Continued).

Dist.	NAME	POLITICS	OCCUPATION	POST-OFFICE ADDRESS
4	James M. Mead.....	Democrat..	Electrician.....	21 So. Geary st., Buffalo.
5	Alexander A. Patrzykowaki..	Democrat..	Merchant.....	1123 Broadway, Buffalo.
6	George H. Rowe.....	Republican.	Lawyer.....	40 Wakefield ave., Buffalo.
7	Herbert A. Zimmerman.....	Republican.	Lawyer.....	721-723 Brisbane Bldg., Buffalo.
8	Nelson W. Cheney.....	Republican.	Farmer.....	Eden.
	ESSEX			
	Raymond T. Kenyon.....	Republican.	Dentist.....	Ausable Forks.
	FRANKLIN			
	Warren T. Thayer.....	Republican.	Manufacturer.....	Chateaugay.
	FULTON-HAMILTON			
	Burt Z. Kasson.....	Republican.	Mining engineer and farmer.....	Gloversville.
	GENESEE			
	Louis H. Wells.....	Republican.	Farmer and merchant..	Pavilion.
	GREENE			
	Harding Showers.....	Republican.	Civil engineer.....	Tannersville.
	HERKIMER			
	Edward O. Davies.....	Republican.	Laundrer.....	Ilion.
	JEFFERSON			
	H. Edmund Machold.....	Republican.	Farmer.....	Ellisburg.
	KINGS			
1	Patrick H. Larney.....	Democrat..	Printer.....	252 High st., Brooklyn.
2	William H. Fitzgerald.....	Republican.	Real estate.....	1084 E. 92d st., Brooklyn.
3	Frank J. Taylor.....	Democrat..	Real estate.....	50 Van Dyke st., Brooklyn.
4	Peter A. McArdle.....	Democrat..	Real estate.....	137 Keap st., Brooklyn.
5	James H. Caulfield, Jr.....	Republican.	Investigator.....	872 Madison st., Brooklyn.
6	William M. Feigenbaum.....	Socialist..	Statistician & journalist	444 Pearl st., N. Y. City.
7	Daniel F. Farrell.....	Democrat..	Hatter.....	378 17th st., Brooklyn.
8	John J. McKeon.....	Democrat..	Real estate.....	413 Smith st., Brooklyn.
9	Frederick S. Burr.....	Democrat..	Freight broker.....	8723 Ridge boul., Brooklyn.
10	Hoxie W. Smith.....	Democrat..	Stock broker.....	195 Flatbush ave., Brooklyn.
11	Thomas E. Brownlee.....	Republican.	Lawyer.....	177 Gates ave., Brooklyn.
12	Albert Link.....	Democrat..	School teacher.....	483 8th st., Brooklyn.
13	Morgan T. Donnelly.....	Democrat..	Lawyer.....	101 Powers st., Brooklyn.
14	Joseph A. Whitehorn.....	Socialist..	Lawyer.....	791 Broadway, Brooklyn.
15	Jeremiah F. Twomey.....	Democrat..	Pharmacist.....	151 Java st., Brooklyn.
16	Kenneth F. Sutherland.....	Democrat..	Dep. col. U. S. int. rev.	2834 W. 1st st., Coney Island
17	Frederick A. Wells.....	Republican.	Cigar manufacturer....	215 Montague st., Brooklyn.
18	Marshall Snyder.....	Republican.	Lawyer.....	1346 Eastern Parkw., Bklyn.
19	Benjamin C. Klingmann.....	Democrat..	Real estate.....	1501 DeKalb ave., Bklyn.
20	George J. Braun.....	Democrat..	Fgt. and custom broker	149 Bleeker st., Brooklyn.
21	Wilfred E. Youker.....	Republican.	Lawyer.....	310 Kenmore pl., Brooklyn.
22	James J. Morris.....	Democrat..	Salesman.....	2244 Pitkin ave., Brooklyn.
23	Abraham I. Shipplacoff.....	Socialist..	Lecturer, teacher and writer.....	759 Howard ave., Bklyn.
	LEWIS			
	Albert A. Copeley.....	Republican.	Ins. and real estate....	Lowville.
	LIVINGSTON			
	George F. Wheelock.....	Republican.	Farmer.....	Leicester.
	MADISON			
	Morell E. Tallett.....	Republican.	Coal and produce.....	De Ruyter.
	MONROE			
1	James A. Harris.....	Republican.	Fruit grower.....	E. Rochester, R. F. D. No. 2.
2	Simon L. Adler.....	Republican.	Lawyer.....	813 Wilder Bldg., Rochester.
3	Harry B. Crowley.....	Republican.	Insurance.....	503 Granite Bldg., Rochester.
4	Frank Dobson.....	Republican.	Farming.....	Rochester, Charlotte sta.
5	Franklin W. Judson.....	Republican.	Farmer.....	R. F. D. Lincoln Park.
	MONTGOMERY			
	Erastus Corning Davis.....	Republican.	Merchant and manuf..	Fonda.
	NASSAU			
1	Thomas A. McWhinney....	Republican.	Automobile business...	Lawrence.
2	Franklin A. Coles.....	Republican.	Lawyer.....	Glen Cove.

STATE DEPARTMENT REPORTS

xxix

MEMBERS OF ASSEMBLY — (Continued).

Dist.	NAME	POLITICS	OCCUPATION	POST-OFFICE ADDRESS
NEW YORK				
1	Peter J. Hamill.....	Democrat..	Bonds and insurance...	262 William st., N. Y. City.
2	Cecar B. F. Barra.....	Democrat..	Lawyer.....	61 Park Row, N. Y. City.
3	Peter P. McElligott.....	Democrat..	Lawyer.....	360 W. 21st st., N. Y. City.
4	William Karlin.....	Socialist..	Lawyer.....	309 E. Broadway, N. Y. City.
5	Charles D. Donohue.....	Democrat..	Lawyer.....	408 W. 43d st., N. Y. City.
6	Elmer Rosenberg.....	Socialist..	Cloak cutter.....	269 E. 4th st., N. Y. City.
7	Abram Ellenbogen.....	Republican.	Lawyer.....	233 Broadway, N. Y. City.
8	Louis Waldman.....	Socialist..	Civil engineering.....	225 E. 12th st., N. Y. City.
9	Martin Bourke.....	Republican.	Lawyer.....	271 Broadway, N. Y. City.
10	Eliot Tuckerman.....	Republican.	Lawyer.....	121 E. 35th st., N. Y. City.
11	William C. Amos.....	Republican.	Investment securities.....	250 W. 103d st., N. Y. City.
12	Martin G. McCue.....	Democrat..	Real estate.....	734 Third ave., N. Y. City.
13	Charles M. Havican.....	Democrat..	Supt. of construction.....	550 W. 126th st., N. Y. City.
14	Mark Goldberg.....	Democrat..	Lawyer.....	222 E. 72d st., N. Y. City.
15	Schuyler M. Meyer.....	Republican.	Lawyer.....	20 Exchange pl., N. Y. City.
16	Maurice Bloch.....	Democrat..	Lawyer.....	407 E. 88th st., N. Y. City.
17	August Claessens.....	Socialist..	Teacher.....	64 E. 97th st., N. Y. City.
18	Owen M. Kiernan.....	Democrat..	Advertising.....	163 E. 89th st., N. Y. City.
19	Edward A. Johnson.....	Republican.	Lawyer.....	17 W. 132d st., N. Y. City.
20	Charles A. Winter.....	Democrat..	Lawyer.....	54 E. 129th st., N. Y. City.
21	Harold C. Mitchell.....	Republican.	Lawyer.....	165 Broadway, N. Y. City.
22	Earl A. Smith.....	Democrat..	Lawyer.....	38 Ft. Washington ave., N. Y. City.
23	Ellis A. Bates.....	Republican.	Lawyer.....	86 Haven ave., N. Y. City.
NIAGARA				
1	William Bewley.....	Republican.	Manufacturer.....	Lockport.
2	Nicholas V. V. Franchot, 2d.	Republican.	Insurance.....	Niagara Falls.
ONEIDA				
1	Henry D. Williams.....	Republican.	Lawyer.....	108 Genesee st., Utica.
2	Louis M. Martin.....	Republican.	Lawyer.....	Clinton.
3	George T. Davis.....	Republican.	Lawyer.....	Willett Block, Rome.
ONONDAGA				
1	Manuel J. Soule.....	Republican.	Farmer.....	Euclid.
2	Harley J. Crane.....	Republican.	Lawyer.....	City Bank Bldg., Syracuse.
3	George R. Fearon.....	Republican.	Lawyer.....	614 Gurney Bldg., Syracuse.
ONTARIO				
	George M. Tyler.....	Republican.	Farmer.....	North Bloomfield.
ORANGE				
1	William F. Brush.....	Republican.	Auctioneer and appraiser	Newburgh.
2	Charles L. Mead.....	Republican.	Lawyer.....	Middletown.
ORLEANS				
	Frank H. Lettin.....	Republican.	Fruit grower and physician	Albion.
OSWEGO				
	Thaddeus C. Sweet.....	Republican.	Paper manufacturer....	Phoenix.
OTSEGO				
	Allen J. Bloomfield.....	Republican.	Proprietor summer hotels.....	Richfield Springs.
PUTNAM				
	John P. Donohoe.....	Republican.	Farmer and real estate.	Garrison.
QUEENS				
1	Peter A. Leininger.....	Democrat..	Real estate and insurance.....	640 Academy st., Long Island City.
2	Peter J. McGarry.....	Democrat..	Real estate.....	71 Greenpoint ave., Long Island City.
3	John Kennedy.....	Democrat..	Labor official.....	2 Lenox ave., Winfield, L. I.
4	L. Eugene Decker.....	Democrat..	Lawyer.....	320 Fulton st., Jamaica, N. Y.
5	Albert J. Brackley.....	Democrat..	Clerk and real estate....	46 Crescent st., Far Rockaway.
6	William H. O'Hare.....	Democrat..	Lawyer.....	33 Parkview ave., Glendale.
RENSSELAER				
1	John F. Shannon.....	Democrat..	Electrician.....	Troy.
2	Arthur Cowee.....	Republican.	Gladiolus specialist and farmer.....	Berlin.

MEMBERS OF ASSEMBLY

MEMBERS OF ASSEMBLY — (Concluded).

Dist.	NAME	POLITICS	OCCUPATION	POST-OFFICE ADDRESS
RICHMOND				
1	Thomas F. Curley.....	Democrat...	Lawyer.....	Castleton Park, New Brighton.
2	Henry A. Seesselberg.....	Democrat...	Banker.....	Stapleton.
ROCKLAND				
	Gordon H. Peck.....	Republican.	Retired brick manufacturer.....	West Haverstraw.
ST. LAWRENCE				
1	Frank L. Seaker.....	Republican.	Automobile dealer.....	Gouverneur.
2	Edward A. Everett.....	Republican.	Lawyer.....	Potsdam.
SARATOGA				
	Gilbert T. Seelye.....	Republican.	Farmer.....	Burnt Hills.
SCHENECTADY				
1	Walter S. McNab.....	Republican.	Lawyer.....	514 State st., Schenectady.
2	A. Edgar Davies.....	Republican.	Lawyer.....	501 Lenox rd., Schenectady.
SCHENARIE				
	George A. Parsons.....	Democrat...	Farmer.....	Sharon Springs.
SCHUYLER				
	Hiram H. Graham.....	Republican.	Farmer and produce dealer.....	Beaver Dam.
SENECA				
	Lewis W. Johnson.....	Republican.	Foreman machine shop.	Seneca Falls.
STEBEN				
1	Samuel E. Quackenbush....	Republican.	Real estate and insurance.....	Corning.
2	Richard M. Prangen.....	Republican.	Ice business and farming.....	Hornell.
SUFFOLK				
1	De Witt C. Talmage.....	Republican.	Farmer.....	East Hampton.
2	Henry A. Murphy.....	Republican.	Real estate insurance..	Huntington.
SULLIVAN				
	William B. Voorhees.....	Republican.	Merchant.....	Roscoe.
TIOGA				
	Daniel P. Witter.....	Republican.	Farmer and teacher of scientific agriculture..	Berkshire.
TOMPKINS				
	Casper Fenner.....	Republican.	Farmer.....	Ludlowville.
ULSTER				
	Joel Brink.....	Republican.	Dealer in coal, lumber and general merchandise.....	Lake Katrine.
WARREN				
	Frank C. Hooper.....	Republican.	Mining engineer.....	North River.
WASHINGTON				
	Charles O. Pratt.....	Republican.	Lawyer and farmer....	Cambridge.
WAYNE				
	Frank D. Gaylord.....	Republican.	Canner and fruit packer	Sodus.
WESTCHESTER				
1	Bertrand G. Burnett.....	Republican.	Real estate.....	Bronxville.
2	William J. Fallon.....	Republican.	Lawyer.....	Mamaroneck.
3	William Belknap.....	Democrat...	Insurance.....	Oscawana.
4	Mitchell A. Trahan, Jr.....	Republican.	Merchant.....	Yonkers.
5	George Blakely.....	Republican.	Bricklayer and plasterer	5 Hamilton ave., Yonkers.
WYOMING				
	Bert P. Gage.....	Republican.	Farmer and automobile dealer.....	Warsaw.
YATES				
	James M. Lown, Jr.....	Republican.	Lawyer and farmer....	Penn Yan

GOVERNOR'S MESSAGES

ANNUAL MESSAGE

(Transmitted to the Legislature, January 2, 1918)

To the Legislature:

When the Congress of the United States declared war on the Imperial German government, New York responded with vigor and enthusiasm to the call for volunteers, and in every walk in life her citizens have done, and are still doing, all they can to insure the success of our cause.

The State Administration has stood solidly behind the President and Federal authorities.

There entered the military and naval service of the United States between April first and December first, over 164,014 citizens of the State of New York apportioned as follows:

New York National Guard (Federalized), over..	41,000
Naval Militia	5,432
National Army	69,241
Volunteers joining the Army.....	30,818
Volunteers joining the Navy.....	15,410
Volunteers joining the Marine Corps.....	2,113
<hr/>	
Total	164,014
<hr/>	

In this connection, I desire to call your attention to the successful operation of the Selective Draft Law by those charged with its administration in the State. The 7,947 men comprising and connected with the boards of exemption have, in all but two or three unfortunate instances, cheerfully and faithfully performed their duties at great personal sacrifice.

The amount of the first Liberty Loan apportioned to the State of New York was \$897,922,000, and the amount subscribed for

[Vol. 14]

Transmitted to the Legislature January 2, 1918.

in the State was \$1,044,724,900. The amount of the second Liberty Loan apportioned to the State of New York was \$1,346,898,000, and the amount subscribed for was \$1,413,107,300.

The State Food Commission provided for by chapter 813 of the Laws of 1917, immediately upon its appointment conferred with Mr. Hoover and the Federal authorities and has worked out a plan of cooperation.

At the conference it was decided that inasmuch as under the act of Congress the Federal authorities had certain broad powers, such as the power to determine the control of transportation and distribution, the regulation of manufacturers, wholesalers, storage and commission merchants, the enforcement of the law against hoarding, which are largely matters of an interstate character, these powers could best be exercised under the Federal act.

The following quotation from the agreement entered into between the State Food Commission and Mr. Hoover shows the features of the work that could best be enforced under the State law:

"In relation to the activities of the State Food Commission, it is recognized that at certain points the Federal and State authority and objectives overlap. In the main, the State Commission possesses much wider authority over retail distribution and possesses large powers in control of public eating places, establishment of public markets, purchase and sale of food by municipalities, collection of information, control of transportation, and stimulation of production, which are not possessed by the Federal administration."

In order to establish the greatest possible cooperation, it was agreed that the three members of the State Food Commission and the two Federal administrators for the State of New York should be consolidated into one Federal board with the president of the State Food Commission as chairman. Thus, there has been created a combination of power and authority which will enable the National and State administrators unitedly to enforce and make effective the control and distribution of the food supply within the State, taking advantage of the strongest provisions of both acts.

Transmitted to the Legislature January 2, 1918. [Vol. 14]

On the twentieth day of October, the city of New York duly made application for the power to buy, store and sell food and fuel, and on November first, after a hearing, the State Commission granted the city of New York the power requested upon the following conditions: *first*, that the grant should be revocable by the Commission, and, *second*, that the city of New York should make monthly reports to the Commission of its operations.

After this prompt action on the part of the State authorities, it is to be regretted that those having the matter in charge in the city have not been able to agree on the officer to do the purchasing, and hence the people have been denied the needed relief.

No other city has requested permission to buy, store and sell food or fuel under the provisions of the act.

By the provisions of chapter 521 of the Laws of 1917, the Excise Commissioner, with the approval of the Governor, is given power to prohibit or limit the sale of alcoholic beverages in proximity of the camps and barracks of the State or Federal troops, or munition factories and places where war supplies are produced.

Five orders have been made under the provisions of this chapter.

The New York State census and inventory of military resources, taken last June with the aid of 180,000 volunteer assistants, has furnished the State with a classified index of its residents, between the ages of sixteen and fifty-one, showing what they can do and what they own that may be of use in war time. The Federal government has been quick to take advantage of the census, securing lists of alien enemies, the names of cooks, firemen, mechanics, shipbuilders and other workers needed by the government, and the names of men who desired to enlist. Letters from officials of the Federal government state that the census has given them the most valuable assistance in their recruiting work, in speeding up ship construction and in seeking out alien enemies.

The census has also been of great assistance to the Military Training Commission in carrying out the provisions of the act requiring compulsory military training for all boys above the age of sixteen and not over the age of nineteen.

[Vol. 14] Transmitted to the Legislature January 2, 1918.

During the past summer the State faced a serious situation by reason of the absence of the National Guard. Not only was it confronted with the same local problem as every other State, namely, that of safeguarding the lives and property of its citizens, but also with the added responsibility of guarding its railways and waterways over which large quantities of supplies were being transported to the port of New York for shipment abroad to our soldiers and our allies.

Section 3 of article XI of the Constitution of the State provides:

“ * * * that there shall be maintained at all times a force of not less than ten thousand enlisted men, fully uniformed, armed, equipped, disciplined and ready for active service.”

To meet the constitutional provision, it was necessary to recruit a force to take the place of the National Guard as it was mustered into the Federal service.

The work of organizing the New York Guard was begun in July and was so well advanced on August second when the War Department notified the Adjutant-General that all the federalized National Guard in the State of New York doing guard duty would be withdrawn on August tenth, that the State notified the War Department it was ready to take over this work. Troops of the New York Guard, fully armed and equipped, replaced the federalized National Guard on all State buildings and took over the guarding of five hundred miles of canal. The State also, at the request of the mayor of the city of New York, assumed the guarding of the Croton and Catskill Aqueducts, the property of the city of New York.

During September the New York Guard was recruited up to full strength — that is, 10,000 men — and is now recruited up to over 14,000. It has been armed with rifles purchased by the State and is being uniformed at the present time.

All of the brigade and regimental commanding officers of the New York Guard have been trained in the New York National Guard, and with but one exception have served with the units to which they are now assigned. No officers are commissioned

Transmitted to the Legislature January 2, 1918.[Vol. 14]

except upon recommendation of the commanding officer, approved by their brigade commander. Thus there will be preserved under officers of their own training and in their own armories, the fine traditions of our National Guard regiments which entered the Federal service and thereby lost regimental numbering.

On September 1, 1917, Home Defense units were given opportunity to apply for muster in the New York Guard and over 6,000 well-trained men of an unusually fine type have thus joined. It was of great advantage to the new guard to obtain the services of so many well-trained recruits.

The Home Defense force which is now made up of more than 11,000 men will be used as an emergency aid in home communities during the continuance of the present war, as provided by chapter 235 of the Laws of 1917.

The organization of this new guard has given an opportunity to readjust old regimental lines to conform to railway transportation facilities and has made possible the placing of units of the New York Guard in many counties which have not maintained any, thus distributing the armed forces more evenly over the State.

The greatest care has been taken to see that every cent of the State's funds, expended by reason of the war emergency, was properly expended and that there should be no waste. To this end there has been organized in the Adjutant-General's office a division of chambers of commerce, so that there and throughout the State the trained business advice of those non-partisan bodies will be immediately available on every problem affecting our war expenditures.

As showing what organized labor in this State is doing to aid the country in the war, I call your attention to the fact that while there were reported to the Bureau of Mediation and Arbitration in the State Industrial Commission between April 1, 1916, and November 30, 1916, 385 strikes, which involved 216,043 persons, during the same period in 1917 there were reported to the bureau but 228 strikes, involving less than 65,000 persons.

The farmers of New York State, by their noble response to

[Vol. 14]

Transmitted to the Legislature January 2, 1918.

the country's call, have increased the cultivated acreage over 30 per cent, and consequently the food supply has been augmented.

I hope your Honorable Body will do everything in its power to encourage that class of citizens which is so valiantly supporting our cause on the farms of the State.

FINANCE

I am sending herewith as part of this message my compilation of appropriations desired by the departments and institutions of the State, together with my recommendations, in the form of a tentative appropriation act, for appropriations at this session.

At a later date in a separate communication I will further discuss these requests and recommended appropriations as part of my budget estimate to your Honorable Body.

TOWNSHIP SCHOOL LAW

I call your attention to the widespread discontent among the rural communities due to the passage of the so-called Township School Law.

This law was introduced and passed at the instance of the Regents of the University of the State of New York in the belief that it would better rural school conditions. I was also informed that the measure had the approval of the officers of the State Grange, who took the same view.

While it was designed to promote the consolidation of weak and inefficient schools with the stronger and better equipped, its framers apparently overlooked the existing conditions in some of the rural districts and, therefore, undertook practically to force the abolition of many of the existing school districts and their union with stronger schools when such consolidation was impractical.

The result seems to be a very large increase of taxes among the rural districts without a corresponding increase in equipment, in teaching, or in efficiency.

It has thrown upon some of the rural districts the burden of supporting, in large measure, union free schools located in the

Transmitted to the Legislature January 2, 1918. [Vol. 14]

larger villages of townships, and investigation has shown that the consolidation of eight or nine rural districts, some of which are five, six or seven miles from the central high school, cannot be accomplished advantageously at the present time.

Another feature of the bill which is objectionable is the fact that the town board of education is given power to raise by taxation the necessary expenses of running the schools, thus depriving the people of the right to vote on the amount of money to be expended for school purposes within the school district.

As a general principle the continuance of local self-government for the purpose of raising funds for the local public expenditure should still be regarded as one of the fundamental safeguards of our State.

Taking into consideration these and other objections to the law and bearing in mind the practical demonstration afforded by the experience of the past year and the failure of the law properly to accomplish the purpose for which it was enacted, it is my belief that the best interests of the State require its amendment.

AGRICULTURE

The Council of Farms and Markets provided for by chapter 802 of the Laws of 1917 has been appointed and is proceeding to consolidate and reorganize the Department of Agriculture and the Department of Foods and Markets.

I am confident that the men appointed to this Council are in thorough sympathy with the needs of the farmer; some of them depend upon farms for their livelihood, while others have been successful in conserving and distributing farm products.

The Council has wisely placed at the head of the various bureaus in the agricultural division, men who have the confidence of those who till the soil, raise the livestock and grow the fruit—farmers of wide practical experience.

I recommend a careful study of the question of the shortage of farm labor.

I have viewed with alarm the decline of the livestock industry in this State. It is important that something be done to encourage and promote it.

[Vol. 14] Transmitted to the Legislature January 2, 1918.

It has been authoritatively stated that during the past year there has been an increase of 44 per cent in the slaughter of dairy cattle, while there has been an increase of 28 per cent in the number of calves slaughtered during the same period in the year 1916. The law of this State provides for the slaughter of dairy cattle suffering from bovine tuberculosis and of horses suffering from glanders. The owners are paid damages by the State.

When the present State administration took office in 1915 the Legislature had failed for some years to make appropriations for the payment of these damage claims. Large appropriations were necessary to pay claims in arrears and to provide for the payment of current audited claims. This gave some relief to the owners but it did not go far enough.

I have included in my tentative budget proposals an item of \$225,000 to provide for the payment of such claims now due and I have included an item of \$200,000 for the payment of claims which will accrue during the year ending June 30, 1919. Thus, payments will not depend upon the action of a future Legislature but will be made immediately to the owners.

CONSERVATION OF WATER POWER

For several years past there have been endeavors to formulate a policy for the conservation of the water powers of the State, but as yet no adequate solution of this problem has been found. I am convinced that now is the time for the adoption of a policy that will enable the State not only to develop these natural resources but also to derive a substantial revenue therefrom.

It was the practice in the past to grant to individuals, by private bills, the right to use the water powers of the State without consideration. Thus properties of inestimable value, formerly the property of all the people of the State, by reason of such grants yield no income to the State, and frequently it has been necessary for the State to reclaim at an enormous expense the property granted by these private bills.

Transmitted to the Legislature January 2, 1918.

[Vol. 14]

Never before has the need of electric power been so urgent as it now is and will continue to be, not only for the period of the war, but thereafter. We need the development of the vast natural resources of the State to win the war as well as to win in the commercial strife that will inevitably follow. I call your attention to the prevailing scarcity of nitrogen, which can be alleviated only by such development. Nitrogen, so necessary to the farmer, now costs him thirty-five cents a pound in nitrate of soda, while in Norway nitrogen is produced by hydro-electric power at a cost of seven cents a pound.

Under the present laws, the State is prohibited from disposing of any surplus waters created by the canal improvement. The surplus power created incidentally by the construction of the canal is now being wasted. The increasing cost of maintaining our State government is a continuing serious problem, and the direct revenue of the State can be increased without appreciable expense to it by leasing the surplus waters.

Realizing the importance of this question, I requested the State Engineer, the Attorney-General, the Superintendent of Public Works and the Conservation Commissioner to study the question and to report to me their conclusions and recommendations.

In reading the report of the committee appointed by me, whose recommendations I heartily indorse, I hope you will bear in mind the distinction between the State's selling water power and the generation of electricity which will result from the power furnished by the State. The committee is opposed to the State's entering into the hydro-electric business, but believes that the State should reserve to itself the right to dispose of the latent power of the impounded water.

The recommendations of the committee are as follows:

"Your committee has decided upon submitting to you four suggestions, the first two of which, while concrete in themselves, necessarily have a direct bearing upon the third, and in the opinion of your committee should be effected in order to permit of a proper and certain accomplishment of the third suggestion.

"1. To amend the Constitution so as to take from the Legis-

[Vol. 14] Transmitted to the Legislature January 2, 1918.

lature the power to grant away, by private bills, the water powers of the State.

"2. To repeal article 7-a of the Conservation Law which provides for river regulation by storage reservoirs.

"3. The immediate passage of appropriate legislation to enable the State to develop the undeveloped water powers of the State through a commission to be appointed by the Governor and to market the power thus developed under the direction of such commission.

"4. The immediate passage of appropriate legislation authorizing the Superintendent of Public Works, with the approval of the Canal Board, to dispose for proper returns by lease of surplus water power created as a result of the construction of the Barge canals."

THE IMPROVED CANAL SYSTEM

The completion of the canal enlargement project, authorized by chapter 147 of the Laws of 1903, is at hand. The new Oswego-Troy route was opened to navigation last summer, as was also the enlarged channel extending northerly to Lake Champlain. The main line connecting the Hudson river with Lake Erie will be ready for use next summer.

The canals constitute the most splendid system of waterways in the country, both from a strategical and from a commercial standpoint. They connect the Great Lakes with the seaboard. They are a part of the great line of west to east communication. They extend through one of the most densely populated sections of the United States. The population of this State is approximately 10 per cent of the total population of the nation, and in a zone within twenty miles on each side of the canal line between New York and Buffalo 8,000,000 people, or 80 per cent of the State's entire population, reside. Over 1,000,000 people reside within the cities of Buffalo, Rochester, Syracuse, Utica, Troy and Albany, and at the terminus of the waterway lies New York with a population of 5,000,000.

The necessity for a full use of the canals is urgent. I am reliably informed that the railroads of the country, and particu-

Transmitted to the Legislature January 2, 1918.

[Vol. 14]

larly those which traverse this State, have almost reached the limit of their capacity, and that, when such limit has been attained, more than 15 per cent of freight will be left for movement by other means. The shipment of commodities by canal affords every advantage. If economy in movement is desired, the lower water rate will supply it. If the speedy receipt of goods is demanded, the canals will, with the certain freight congestion of next summer, excel the railroads in time of delivery.

Aside from the benefits which must accrue to the citizens of this State by the rehabilitation of canal commerce, the use of the new waterways is a military necessity. The needs of the great American army abroad must be supplied at all costs. The armies of our allies must be served. Without the fullest use of every means of transportation, the situation, which already is acute, will be most serious by midsummer. A crisis in the transportation situation is at hand. It must be met and vigorous action taken to relieve it. Relief can be provided by a full utilization of the canals. They have a capacity of at least 10,000,000 tons a year, which would be equal to the conservation of 500,000 freight cars annually, thus supplementing existing transportation facilities to that extent.

Next summer the canal will be completed, but the freight problem is not solved merely by its completion. There must be ready for use at the same time new and modern freight carrying boats and operating companies, officered by energetic, capable men. The State will have provided at an expense of \$154,000,000 a plant without equal in the country. It now offers it to the people toll free to be used for the purposes of commerce or national defense.

CHANGES IN THE ELECTION LAW

Inasmuch as the voters of the State have adopted the amendment to section 1 of article II of the Constitution, I urge upon you the necessity of amending the Election Law so as to provide proper machinery for allowing the women of the State to vote at the elections next spring.

It is most important that adequate and equitable provision be

[Vol. 14] Transmitted to the Legislature January 2, 1918.

made immediately for the registration of women voters for the spring elections, as the present law provides one day only for the correction of the register.

Women voters should also be given an opportunity to enroll in political parties and take part in the primaries to be held next fall.

In this connection it is interesting to note that the twelve States having equal suffrage, the States of Arizona, California, Idaho, Kansas, Montana, Nevada, Oregon, Washington and Wyoming permit the nomination of candidates for public office by petition only, while the States of Colorado, Illinois and Utah permit the nomination of candidates for the primaries both by petition and by political conventions. In the State of Colorado, however, all of the candidates receiving as much as 10 per cent of the vote of a convention are placed upon the primary ticket.

RESULTS OF EXCISE LEGISLATION

In 1897, after the first elections under the Raines Law, the issuance of any kind of licenses for trafficking in liquors was forbidden in 262 towns of the State out of a total of 942.

The following table shows the number of towns in which no licenses were issued, the number of towns having partial and full licenses, the number of full license towns and the number of partial license towns on the first of May each year, from 1897 to 1918, those for the 1st of May, 1918, being determined at the elections during the present year.

May 1	Number of no license	Number of partial and full license	Number of full license	Number of partial license
1897.....	262	680	359	321
1898.....	263	679	361	318
1899.....	276	657	346	311
1900.....	276	657	346	311
1901.....	285	647	349	298
1902.....	284	648	344	304
1903.....	285	648	344	304
1904.....	298	635	344	291

Transmitted to the Legislature January 2, 1918.

[Vol. 14]

May	Number of no license	Number of partial and full license	Number of full license	Number of partial license
1905.....	309	624	339	285
1906.....	310	623	332	291
1907.....	308	625	329	296
1908.....	314	619	336	283
1909.....	338	595	325	270
1910.....	394	539	294	245
1911.....	414	519	326	193
1912.....	412	521	366	155
1913.....	410	523	374	149
1914.....	407	526	384	142
1915.....	421	511	371	140
1916.....	498	435	322	113
1917.....	519	414	310	104
1918.....	584	348	208	140

The following percentages are interesting as showing the growth of the sentiment in favor of no license.

In 1897 the voters in 27.8 per cent of the towns of the State had voted in favor of no license. In 1902, the number had increased to 30.5 per cent; in 1907, to 33 per cent; in 1912, to 43.3 per cent; in 1917, to 55.6 per cent. During the year 1917, however, sixty-five towns voted no license, with the result that now over 62 per cent of the rural communities of the State forbid trafficking in liquor of any kind, and the increase in the number of no-license towns since 1915 is greater than the increase in the period between 1897 and 1915.

STATE POLICE

The Superintendent of State Police immediately after his appointment on May second, made a personal study of the Pennsylvania Constabulary and the Canadian Mounted Police systems.

The first examination for troopers was held on June eleventh. On July sixteenth, the recruits began their training, and on September sixth began their active duty by policing the State Fair Grounds at the time of the State Fair.

[Vol. 14] Transmitted to the Legislature January 2, 1918.

In the meantime four barracks had been prepared near the cities of Batavia, Syracuse, Albany and White Plains.

During the months of October and November, 54,000 miles of highways were patrolled, 258 arrests made, with 207 convictions.

It is gratifying to note that there has been no conflict with the local authorities and that the troopers have not taken part in any industrial disputes.

The Superintendent of State Police requests the creation of one more troop, to be called a detached post troop. He states that if this troop, consisting of forty-five troopers, two commissioned and seventeen noncommissioned officers, is created, it will be years before the department need again be increased, as twenty-five posts can be established, which, added to the ten stations already assigned, will make thirty-five stations, each with a radius of approximately twenty miles. Three men could then be placed at each station — one a motor cyclist, one on foot and one mounted. By this method practically every citizen would be within twenty miles from such post and by the use of the motor cycle quick service could be rendered.

POWERS OF THE STATE IN WAR TIME

A legal proceeding was brought to test the constitutionality of the statute giving power to the Commissioner of Excise, with the approval of the Governor, to regulate the traffic in liquor in certain territory during the war.

The Appellate Division of the Second Department unanimously held it constitutional.

I quote so much of the opinion as bears upon the question:

"This legislation now attacked is an emergency measure for the safety and efficiency of the enlisted men while in training, and those engaged in munition and equipment services equally important. It is demanded by the 'high behests of war,' which may call the people to every sacrifice.

"Accustomed, as we have become, to the war powers of the Federal government, we are not to overlook the unquestioned war

Transmitted to the Legislature January 2, 1918.

[Vol. 14]

powers still residing in the State. While the State cannot declare war, or in itself carry it on, it is bound to render loyal aid to the general government, in the effective prosecution of the war. After raising the military and industrial personnel, it is still under a duty to safeguard them from evil influence, even when its citizens have been mustered into the Federal military service. The State has also in good faith to co-operate in the national policies for war efficiency.

"To win this war, the industrial army in factory, mill, and shipyard may become as necessary as the forces in the field. Industrial masses not having been under military training, however, are therefore in greater need of protection. The State shares with the general government in the duty to safeguard the men taken from their homes, mustered into the Federal service, and assembled in military camps. But the number, which is now greater, gathered in war industries, are, for the present, dependent for their protection upon the power of the State alone.

"Should a narrow and technical judicial policy weaken and annul this beneficent State statute, the result in this, as in many a past instance, would necessitate an enlargement of federal control so as to bring the general government more and more into State affairs. The Draft Act, approved May 18, 1917, in section 12 authorizes the President to make 'such regulations governing the prohibition of alcoholic liquors, in or near military camps, and to the officers and enlisted men of the army, as he may from time to time deem necessary or advisable.' Such control is the more wholesome and, being backed by local sentiment, should be more effective, if administered under the principles of home rule. The vast field of the Washington executive already overburdens the President. He should not be called on to supplement, and certainly not to replace, the proper and legitimate exercise of the police power of New York. It is now settled that, by virtue of its general sovereignty, the United States may take such measures as are necessary to insure peace and order in the performance of any of its functions. *Ex parte Siebold*, 100 U. S. 371; *Matter of Debs*, 158 id. 564.

[Vol. 14]

Transmitted to the Legislature January 2, 1918.

"The occasion for this enactment is not disputed. Conditions threaten to demoralize camps, and to hinder, obstruct and delay the production of needed war material. Sales of intoxicants in this region have also led to serious assaults on government workmen passing through this neighborhood. Suspending the liquor traffic will abate most of these conditions, which otherwise may jeopardize the arming and equipment of transports and other government shipping as well as endangering the efficient output of munitions. The statute should, therefore, be sustained."

PRESERVATION OF SOLDIERS' AND SAILORS' CIVIL RIGHTS

The Secretary of War, through the Section on Co-operation with States of the Council of National Defense, has requested that I recommend to your Honorable Body the passage of an act staying civil proceedings against soldiers and sailors in the Federal service.

Attached hereto is a copy of a letter addressed to me by the Honorable George F. Porter, the Chief of the Section on Co-operation with States of the Council of National Defense; a letter addressed to Mr. Porter by the Major Judge Advocate, Assistant to the Judge Advocate General, dated September twenty-seventh, and a letter addressed to Mr. Porter by the Honorable, The Secretary of War, dated October nineteenth.

I recommend a careful study of the report of the judiciary committee of the House of Representatives submitted on October seventh, numbered Report Number 181, and a memorandum before the sub-committee of the committee on the judiciary of the United States Senate on the same bill, which contain a very interesting and exhaustive discussion of the provisions of the bill and of the legal questions involved.

There is probably very little question as to the authority of Congress to pass such an act under its war powers, but a more serious question is involved in regard to the power of a State legislature. However, the decision of the Appellate Division heretofore quoted, unless reversed by the Court of Appeals, may be regarded as authority as to the constitutionality of such legislation.

Transmitted to the Legislature January 2, 1918

[Vol. 14]

There appears to be no general demand for important changes in our laws or for much new legislation.

From 1866 to 1917, with but short interruption, our country enjoyed peace and escaped the sorrows of war. Under these conditions our statute law was built up. Now, when we are engaged in the greatest struggle that the world has ever known, we may find some changes necessary, but it is well to remember that the statutory law is the result of an evolution covering a number of years and is based on experience.

I am apprehensive lest in the name of patriotism some unnecessary and unwise legislation may be enacted, and I, therefore, urge upon you the greatest care in considering proposed legislation.

While I feel it my duty to call your attention to what this State has accomplished so far in the war, and it is with deep gratification that I do so, I realize, as of course you do, that we are not merely New Yorkers—we are Americans.

In the Army and the Navy citizens from every State, sons and grandsons of those who wore the blue and those who wore the gray, the rich and the poor, stand side by side, meet the same danger, endure the same privation, and in the end will share the same victory.

As in the Army and the Navy our citizens are fighting shoulder to shoulder regardless of former conditions or differences, let us also work together, earnestly and unselfishly striving to the utmost to do not only our bit but our best to insure the triumph of our cause.

CHARLES S. WHITMAN.

[Vol. 14]

Transmitted to the Legislature January 2, 1918

COUNCIL OF NATIONAL DEFENSE

SECTION ON COOPERATION WITH STATES

WASHINGTON, *October 6, 1917.*

HON. CHARLES S. WHITMAN, *Governor, State of New York,
Albany, New York:*

DEAR SIR.—The War Department has asked us to bring to your attention for consideration by you for recommendation to the New York Legislature an act staying proceedings against soldiers and sailors in the federal service.

The act was presented to Congress late at the present special session. It has passed the House, but it was impossible to bring it before the Senate at this session.

The act is in no wise a rigid or inflexible stay law. The matter of granting a stay is placed entirely in the discretion of the court, but in no case may a stay be granted unless it is shown that the ability of the defendant to meet his obligation has been substantially impaired by reason of his military service.

Certain criticism that has been directed against the Federal bill, particularly by real estate interests, has evidently been made under a misapprehension as to the provision of the bill. The bill does not allow a soldier or his family to remain in possession of premises for the period of the war without payment of rent. The maximum stay from eviction which can be granted is a period of three months and then only as to premises occupied by the dependents of the soldier where the rent does not exceed \$50.00 per month. A provision for an allotment of pay is also made. The provision as to mortgages in its effect is limited to cases where the mortgage is on a home or small business owned by the soldier and still occupied by his family or his employees. The purpose of the bill has been to exclude anything in the nature of investments.

In spite of the belief that this law will be passed by Congress at the next session, the War Department trusts that the several

Transmitted to the Legislature January 2, 1918[Vol. 14]

States will also pass a law as nearly identical as possible with the proposed Federal statute. The history of State legislation during the Civil War shows that most States are likely to pass some sort of a "stay law" during the present war. It is unnecessary to suggest that any protection given a soldier against suit should be uniform throughout the country. It would likewise be unfortunate to have any inconsistency between State and Federal laws upon this subject.

The War Department, therefore, appeals to the same spirit of cooperation by the States of which the States furnished such a remarkable example in connection with the administration and execution of the provisions of the Selective Service Law.

It is, of course, appreciated that the constitutionality of such a stay law as is here proposed, is more questionable if enacted by the States than if by the Federal Government. It is likewise true that many of the statutes of the Civil War were held unconstitutional by the State courts. It is suggested, nevertheless, that these decisions are not controlling at the present time. The State doctrine of police power has had its growth since the days of the Civil War. May not this doctrine be sufficiently elastic to cover a stay law in time of great public emergency?

We are enclosing a copy of the bill as it passed the House of Representatives and also a copy of certain memoranda concerning the bill before the Senate sub-committee and the report of the House committee on the judiciary.

May we call your attention particularly to pages 6 and 39 to 42 of the memoranda before the Senate sub-committee. You will also find enclosed a copy of a letter from the War Department on the subject.

In view of the appeal to the States made by the War Department for their cooperation, we trust that you may feel it desirable to recommend such legislation to the present special session of the New York Legislature. We shall be glad to know of any action you may take in regard to the matter.

Very truly yours,

GEORGE F. PORTER,
Chief of Section.

[Vol. 14]

Transmitted to the Legislature January 2, 1918

WAR DEPARTMENT

OFFICE OF THE JUDGE ADVOCATE-GENERAL,

WASHINGTON, September 27, 1917.

MR. GEORGE F. PORTER, *Chief, Section on Cooperation with States, Council of National Defense, Washington, D. C.:*

DEAR MR. PORTER.—A bill entitled "Soldiers' and Sailors' Civil Rights Act" has been prepared in this office. It has been drafted with great care and is now pending before both Houses of Congress.

Both the War and Navy Departments feel that the early enactment of this bill by the States, as well as by Congress, is of the highest importance to protect from injury the civil rights of soldiers who are now abroad, as well as those soldiers now at cantonments who will soon be sent to join the forces already on the other side.

We regard it desirable to have the State legislatures enact this law, for the protection extended to such rights of soldiers should obviously be uniform throughout the Union. Some States have already legislated and doubtless many more will in the future legislate on this subject and there should be no opportunity given for the complications which might well arise from different or even inconsistent legislation by Congress and the States.

The undoubted and unique success on so enormous a scale of the method pursued under the Selective Service Law or inviting the voluntary cooperation of the State authorities for a Federal purpose has convinced us that a similar method can be applied in enacting the measure here presented which is so vital to the welfare of the American Army and Navy but which will ultimately depend for its successful carrying out upon the loyal cooperation of the cause in every State.

We trust, therefore, that through the machinery of the Section on Cooperation with States not only will you bring this legislation

Transmitted to the Legislature January 2, 1918[Vol. 14]

to the attention of the State legislatures but that you will use every means at your disposal to secure its early enactment by them.

Yours very truly,

JOHN H. WIGMORE,
*Major, Judge Advocate,
Assistant to the Judge Advocate-General.*

WAR DEPARTMENT,

WASHINGTON, October 19, 1917.

MR. GEORGE F. PORTER, *Chief, Section on Cooperation with States, Council of National Defense, Washington, D. C.:*

DEAR SIR.—A bill entitled "Soldiers' and Sailors' Civil Rights Act" was prepared by a committee representing the War Department and the Council of National Defense, and submitted to Congress at its recent session. The bill passed the House and it is presumed the late date at which it reached the Senate prevented complete action by that body. It has been given the approval of both War and Navy Departments, and it is hoped that it will speedily become a law when Congress reconvenes. It may be possible and desirable to enact many of the provisions of this bill into State law, and such legislation may be of the highest importance in protecting from injury the civil rights of soldiers and sailors who are now abroad, as well as those who are at cantonments and who will soon be sent to join the forces already on the other side.

It is, of course, desirable to have such legislation as may be enacted by the several States on this subject as nearly uniform as possible. Some States have already legislated, and others will doubtless legislate in the future on various phases of this subject, and it is believed that variations and complications may be avoided if the several States will follow the bill introduced in Congress as a general outline of the matters to be covered. The

[Vol. 14] Transmitted to the Legislature January 2, 1918

large measure of success which has followed the method pursued under the Selective Service Law of inviting the voluntary cooperation of the State authorities in pursuance of a vital purpose has convinced me that a similar method can be applied in enacting the measure herein referred to, which is so vital to the welfare of the American Army and Navy, but which will ultimately depend for its successful application upon the loyal cooperation of the local officials in the several States.

I trust, therefore, that, through the machinery of the section of the Council of National Defense on Cooperation with States, you will not only bring this legislation to the attention of the State legislatures, but that you will use every proper means at your disposal to secure early and favorable consideration by them.

Yours respectfully,

NEWTON D. BAKER,
Secretary of War.

RELATIVE TO PROPOSED AMENDMENT TO FEDERAL CONSTITUTION

(Transmitted to the Legislature January 2, 1918)

To the Legislature:

I have received from the Secretary of State of the United States a certified copy of a resolution of Congress, entitled "Joint Resolution Proposing an amendment to the Constitution of the United States," and in accordance with his request, I submit it to your Honorable Body for such action as may be had thereon.

Attached hereto is a copy of the communication of the Honorable, the Secretary of State, a copy of the joint resolution and the certification thereof by the Secretary of State. This communication and the certified copy of the resolution did not reach me in time to be included in my annual message.

CHARLES S. WHITMAN.

Transmitted to the Legislature January 2, 1918[Vol. 14]

DEPARTMENT OF STATE

WASHINGTON, December 28, 1917.

His Excellency, The Governor of the State of New York, Albany:

SIR.— I have the honor to enclose a certified copy of a Resolution of Congress, entitled "Joint Resolution Proposing an amendment to the Constitution of the United States," with the request that you cause the same to be submitted to the Legislature of your State for such action as may be had, and that a certified copy of such action be communicated to the Secretary of State, as required by Section 205, Revised Statutes of the United States. (See overleaf.)

An acknowledgment of the receipt of this communication is requested.

I have the honor to be, Sir,

Your obedient servant,

ROBERT LANSING.

SEC. 205. Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States. Revised Statutes, 1878.

UNITED STATES OF AMERICA

[SEAL]

DEPARTMENT OF STATE

To all to whom these presents shall come, Greeting:

I certify that the copy hereto attached is a true copy of a resolution of Congress, entitled "Joint Resolution Proposing an

[Vol. 14] Transmitted to the Legislature January 2, 1918

amendment to the Constitution of the United States," the original of which is on file in this Department.

In Testimony whereof, I, ROBERT LANSING, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Chief Clerk of the said Department, at the City of Washington, this twenty-eighth day of December, 1917.

ROBERT LANSING,
Secretary of State.

By BEN G. DAVIS,
Chief Clerk.

SIXTY-FIFTH CONGRESS OF THE UNITED STATES OF AMERICA

AT THE SECOND SESSION, BEGUN AND HELD AT THE CITY OF
WASHINGTON ON MONDAY, THE THIRD DAY OF DECEMBER, ONE
THOUSAND NINE HUNDRED AND SEVENTEEN.

JOINT RESOLUTION

PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE
UNITED STATES.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following amendment to the Constitution be, and hereby is, proposed to the States, to become valid as a part of the Constitution when ratified by the legislatures of the several States as provided by the Constitution:

"Article —.

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Transmitted to the Legislature January 9, 1918 [Vol. 14]

"Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

"Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

CHAMP CLARK,
Speaker of the House of Representatives.
THOS. R. MARSHALL,
*Vice-President of the United States and
President of the Senate.*

I certify that this Joint Resolution originated in the Senate.

JAMES M. BAKER, *Secretary.*

THE GOVERNOR'S BUDGET ESTIMATE

(Transmitted to the Legislature January 9, 1918)

To the Legislature:

Pursuant to the provisions of chapter 130 of the Laws of 1916, I submit to your Honorable Body a statement of the total amount of appropriations desired by each State department, commission, board, bureau, office and institution, with such suggestions for reductions and additions thereto as I have deemed proper.

At the same time, I submit as a part of such statement an estimate of the probable revenues of the State for the ensuing fiscal year.

In your consideration of appropriations during this time of war, I urge upon you the paramount and patriotic necessity for economy. The State's first duty now is to aid in winning the war, and any proposed expenditure for labor or materials, or of money, should be tested by that rule.

To spend needlessly at this time is to compete with the Federal Government, which needs all the available labor, materials and money or credit possible for war purposes.

[Vol. 14] Transmitted to the Legislature January 9, 1918

THE ESTIMATE OF RESOURCES TO MEET NEW APPROPRIATIONS

I attach hereto and mark as Exhibit "A" of the statistical portion of this budget estimate, the statement prepared for me by the State Comptroller under date of January 3, 1918, of the actual receipts and disbursements of the State (exclusive of bond moneys) for the fiscal year ended September 30, 1915; for the nine months ended June 30, 1916; for the fiscal year ended June 30, 1917, and the estimated receipts and disbursements for the fiscal year ended June 30, 1918, and the estimated resources for the fiscal year ended June 30, 1919.

The liability of the State for appropriations in force as of July 1, 1917 (other than bond account), but including in this figure appropriations passed at the Extraordinary Session of the Legislature as shown by the statement was \$76,485,804.75. It further shows that the cash balance in the treasury at that date available for the liquidation of these liabilities was \$7,248,108.32. The Comptroller's estimate of revenues and receipts of the State for the fiscal year ended June 30, 1918, is \$80,322,119.63. If no appropriations were made by the Legislature of 1918 and none of the appropriations in force on July 1, 1917 (increased by the appropriations of the 1917 Extraordinary Session), lapsed, the condition of the treasury on June 30, 1918, would be as follows:

Total appropriations outstanding for the period, \$76,485,804.75; cash balance and estimated revenues, \$87,570,227.95 or an excess of resources over liabilities of \$11,084,423.20.

The anticipated revenues and receipts for the fiscal year 1918-19 according to the Comptroller's estimate are \$58,440,766.57, so that the total unencumbered balances and anticipated revenues and resources from which the present Legislature without further anticipated revenues may appropriate is this amount of \$58,440,766.57 plus the estimated cash balance of \$11,084,423.20, or \$69,525,189.77.

The Comptroller neither in his figures for the fiscal year ended June 30, 1918, nor for the fiscal year ended June 30, 1919, makes any estimate of accruals, due to lapsed appropriations, within those periods. An accurate estimate of the amount of these lapses

Transmitted to the Legislature January 9, 1918[Vol. 14]

is of course difficult. As stated in my Budget Estimate of last year the best judgment at hand estimated the accruals through lapsed appropriations for the fiscal year ended June 30, 1917, at \$2,000,000. The total of net accruals for this period through lapsed appropriations, in excess of lapsed appropriations revived, as reported by the Comptroller in July, 1917, was \$1,797,781.14 or \$202,218.86 less than that estimate.

The accruals through lapsed appropriations for the fiscal year ended June 30, 1918, were similarly estimated for the purpose of my Budget Estimate of last year at \$1,250,000. In view of the large increase in the appropriations for the current fiscal year over the appropriations for the year ended June 30, 1917, I am advised that the amount of lapsed appropriations for the current year may reasonably be expected to exceed those of the last fiscal year. I am advised also that it is reasonable to assume that lapsed appropriations for the year ended June 30, 1919, will approximate the level of 1918.

Assuming an estimate of \$2,000,000 for lapsed appropriations for each of these years or \$4,000,000 for the two years, the total of treasury resources free for new appropriations for the period beginning with the present legislative session and ending June 30, 1919, would be increased from the figure previously given of \$69,525,189.77 to \$73,525,189.77.

It is of course always the part of prudence to under-estimate rather than over-estimate resources and revenues upon which appropriations are to be based, because the appropriations when made are a fixed amount, while estimated revenues, being under our plan of State finance so largely from indirect sources, may fall below estimates while other anticipated resources are for various reasons likewise uncertain. The State Comptroller of course takes a conservative position in estimates of this character. It is interesting to note, however, that the revenues of the State for the year ended June 30, 1917, were substantially in excess of the estimates of the Comptroller made in his statement to me for the Budget Estimate of last year.

The Comptroller's estimate of revenues and receipts for the

[Vol. 14] Transmitted to the Legislature January 9, 1918

fiscal year ended June 30, 1917, was \$56,528,601.41. The actual revenues and receipts for that year shown by his statement, marked Exhibit "A" of the present Budget Estimate, totaled \$61,593,111.04 or an increase over his estimate of \$5,064,509.63. His estimate of the cash balance as of July 1, 1917, was \$3,530,894.85. The actual balance on that date was \$7,248,108.32.

ADDITIONS TO REVENUES OF THE STATE

In my Budget Estimate transmitted to the Legislature, January 3, 1917, I submitted as one of its most serious problems, the increase of State revenue, if possible, from indirect sources. In accordance with that suggestion, the Tax Law was amended by the last Legislature so as to include a tax of three per cent on the net earnings of manufacturing and mercantile corporations, which will result, according to the Comptroller's estimate, in a net increased revenue to the State of \$9,017,276.13 during the current fiscal year.

The Motor Vehicle Tax Law also was amended to adjust the tax comparatively with the size of the motor vehicle using the State's highways, which amendment, together with the increase in the taxable number of such vehicles, will result in a net increased revenue to the State of \$223,810.58 during the current fiscal year.

At the same time adjustments of the Liquor Tax Law, together with the fact that the area of so-called dry territory in the State is steadily increasing, will result, during the current fiscal year, in an estimated decrease, according to the Comptroller's report, of \$1,835,228.22.

The total revenues, receipts and expenditures for the present fiscal year and the revenues and resources for the fiscal year ending June 30, 1919, as reported by the State Comptroller, have already been discussed in the preceding section of this document and will be found in tabular form, marked Exhibit "A" of the Estimate.

THE ESTIMATE OF APPROPRIATIONS REQUIRED

In the Tentative Appropriation Act, which I transmitted to your Honorable Body, January second last, I suggested for your

Transmitted to the Legislature January 9, 1918

[Vol. 14]

consideration, appropriations to a total of \$78,458,209.29 as against a total of requested appropriations from all divisions of the State government, amounting to \$98,906,888.48.

This recommended appropriation programme is, I believe, adequate to meet all the necessities of the State government for the deficiencies in the appropriations for the current fiscal year, and for the general purposes of the fiscal year of 1918-19. It includes immediate provision for the New York Guard, which, under the terms of the Constitution, I established when the National Guard was called out of the State by the Federal Government. It includes also the necessary funds for an additional troop of State Police, which, I believe, is justified both by the record of the organization established last year and by the added present necessities of home defense and protection in time of war.

The total recommended appropriations for purposes of the military service and its allied activities, including the State Police, are \$4,989,342.83.

DEFICIENCY ALLOWANCES AND INCREASED APPROPRIATIONS FOR FOOD, FUEL, EQUIPMENT, AND SUPPLIES

Last year's rising war prices required substantial increases both in the annual appropriations for the ensuing year and in deficiency items for the replenishment of current appropriations. This upward trend of prices has continued and has brought a still heavier burden upon the appropriations required of the Legislature of 1918. The following tabulation of appropriations of 1917 and requests now before the Legislature of 1918, approved in the Tentative Appropriation Act, for food, fuel, equipment and supplies for the hospitals, charitable institutions and prisons is a striking illustration of how the cost of State government has increased through this cause alone. The increased appropriations recommended for these four items in the institutions is \$3,396,776.58 over what were adequate appropriations at the price levels prevailing during the legislative session of 1917. The figures are:

[Vol. 14] Transmitted to the Legislature January 9, 1918

HOSPITALS, CHARITABLE INSTITUTIONS AND PRISONS

	Food	Fuel	Equipment, including clothing	Supplies
For current deficiencies:				
Legislature of 1917.....	\$403,550 00	\$79,200 00	\$70,004 12	\$180,300 00
Tentative Act, 1918.....	1,139,200 00	661,352 60	212,625 00	207,938 60
For fiscal year:				
Appropriations, 1917-18.....	3,790,350 00	1,079,668 00	708,867 50	667,695 00
Tentative Act, 1918-19.....	4,904,500 00	1,601,400 00	941,970 00	697,425 00
Increase of Tentative Act over appropriations of 1917 Legislature.....	1,849,800 00	1,103,884 60	375,723 38	67,368 60

Total increase of Tentative Act over appropriations of 1917 for food, fuel, equipment and supplies in institutions, \$3,396,776.58.

The State, like the individual housekeeper, is now required to pay a largely increased price for every item purchased. This has increased the appropriations recommended not only for the institutions but for all other departments and offices of the State. I believe that the allowances recommended for these classes of expenditure are adequate for existing deficiencies and will be sufficient to meet all the necessities of the next fiscal year if there is not a further general and abnormal advance in prices.

THE PERSONAL SERVICE OF THE STATE

I have submitted in the Tentative Appropriation Act for favorable consideration the allowance of increases in pay for employees in the labor, mechanical and low-paid clerical and technical service of the State receiving \$1,200 a year or less where increases were recommended by department heads. For employees now receiving an annual salary between that amount and \$3,000, I have carefully considered departmental recommendations and have allowed increases in practically all cases which were justified by department heads. For employees receiving \$3,000 or more per year, I have refused to consider departmental recommendations for increases.

In the Executive Department, I did not recommend any salary increases this year, but I did not insist that such a rule should govern throughout the State service.

While I appreciate that the higher cost of living affects every

Transmitted to the Legislature January 9, 1918

[Vol. 14]

income, I believe that the State has the right to call upon those in its employ who are now receiving salaries of \$3,000 a year or upwards, to make what sacrifices may be necessary by reducing their expenditures for such luxuries as can be dispensed with in time of war.

APPROPRIATIONS FOR THE LEGISLATURE

Appropriations for legislative purposes for the next fiscal year are set forth in itemized form in the Tentative Appropriation Act for 1918. Appropriations in lump sum form for the current fiscal year were submitted to me by the Legislature of 1917 and vetoed by me because of that fact. The Legislature afterwards passed these appropriations over my veto. The present itemized figures were submitted to me by the Clerks of the Senate and the Assembly. I am pleased to report that the Chairman of the Finance Committee of the Senate and of the Ways and Means Committee of the Assembly decided this year to support me in the position that legislative appropriations should be itemized under the same classifications which have been applied to all other departments of State government.

The necessary expenditures of Joint Legislative Investigating Committees embraced in one item of \$50,000 which shall be payable only on the audit of the Comptroller after approval by the Chairman of the Committee, the Speaker of the Assembly and the President of the Senate is the only unsegregated legislative appropriation which I have recommended. In this instance I regarded the restrictions and limitations of its authorization as reasonable restraints upon its expenditure.

LEGISLATIVE PRINTING

The appropriations which previously have been made each year under the title of "Legislative Printing," for printing departmental reports and bulletins have been transferred to and included among the appropriations for the departments which issue these documents. My recommendation for legislative printing this year includes only the items necessary for the purposes of the Legislature itself.

[Vol. 14] Transmitted to the Legislature January 9, 1918

The Appropriation Act of last year generally failed to appropriate for the printing of departmental reports during the fiscal year ending June 30, 1918. I, therefore, recommend that all necessary appropriations be made immediately available for the printing of the departmental reports which will be made to this Legislature.

I would submit further the proposal that the Printing Law be strengthened by the addition of competent authority to be exercised by an official of the State Printing Board in the way of reviewing and reducing departmental reports before they are sent to the printer. I believe that there is frequently unnecessary matter included in these annual reports and also matter which once recorded should not be repeated year after year. A revision of the Printing Law embracing this suggestion would undoubtedly effect a substantial saving to the State.

A CONSTRUCTIVE POLICY FOR HOSPITALS, CHARITABLE INSTITUTIONS AND PRISONS

In my Budget Estimate of last year, I referred to the fact that in the Tentative Appropriation Act transmitted therewith, I had recommended certain appropriations for the three major institutional groups of the State which expressed a definite policy of progressive construction and stated that without such a policy it was difficult to give proper relative consideration to the large and increasing requests for construction purposes each year. I called attention to the fact that by the provisions of chapter 594 of the Laws of 1916, a policy was expressed with respect to the construction needs of the penal institutions of the State and that the Commission which I had appointed, pursuant to the provisions of that law, having developed a policy with respect thereto, an appropriation was made of \$200,000 for the reconstruction of Sing Sing Prison in addition to the appropriations of the Legislature of 1916 of \$400,000 for both Sing Sing Prison and for a new farm and industrial prison on the Beekman or Wingdale site.

Since the appropriations of last year, the Commission has decided upon the construction of a farm and industrial prison on

Transmitted to the Legislature January 9, 1918 [Vol. 14]

Wingdale site. To continue the programme of the Commission both at Sing Sing Prison and at Wingdale, I have recommended to the Legislature in my Tentative Appropriation Act a further appropriation of \$100,000 for Sing Sing Prison and a further appropriation of \$350,000 for the new prison at Wingdale. Appropriations made and recommended for Sing Sing Prison in the three years total \$500,000, and the total authorizations are \$1,525,000. For Wingdale, the totals, including the present Tentative Appropriation Act, are: authorizations — \$1,750,000; appropriations — \$550,000.

Recognizing the importance of the co-ordination of the Executive and Legislative branches of the government, extending over a sufficiently long period of years systematically to reconstruct and develop the hospital and charitable institutions the Legislature of 1917, by chapter 238, created the Hospital Development Commission. This commission has since its organization made an intensive study of the needs of these institutions both as to repairs which will restore the existing structures to a decent condition for safe and sanitary use, and also as to new construction which will within the period of ten years not only eliminate the present overcrowding, but will adequately provide for the expected increase of inmate population within that period.

The recommended allowances both for repairs and construction for these institutions, included in my Tentative Appropriation Act, reflect the programme of the Hospital Development Commission for its first year. Because of the fact that a very important feature of this programme is to fully repair the existing structures the appropriations for the working force of the institutions engaged upon repairs, as well as the appropriations for materials and supplies used in repairs have been transferred in the Tentative Appropriation Act from the maintenance and operation classification to the repair classification. To the extent that these changes have been made, the maintenance and operation appropriations have been reduced and the repair appropriations increased to an equal amount, as compared with the appropriations for the current year.

[Vol. 14] Transmitted to the Legislature January 9, 1918

The transfer of appropriations from maintenance and operation to repairs under this plan have totaled approximately as follows:

For the Hospitals.	\$404,826 00
For the Charitable Institutions	97,712 00
For the Prisons.	65,277 67
<hr/>	
Total for these groups.	\$567,815 67
<hr/>	

The principal items of the programme of the Hospital Development Commission for the insane hospitals, represented by recommended appropriations in my Tentative Appropriation Act, are as follows:

Central Islip State Hospital: An authorization of \$150,000 and an appropriation of \$50,000 for additional quarters for acute and disturbed patients. For new central heating and lighting plant an additional appropriation of \$100,000.

Hudson River State Hospital: Additional accommodations for 100 tubercular patients, an authorization of \$75,000 and an appropriation of \$50,000.

Kings Park State Hospital: Total appropriations for construction of \$167,500, the principal items of which are an authorization of \$150,000 and an appropriation of \$75,000, for additional accommodations for 200 tubercular patients and \$35,000 for water storage reservoir and connections.

Brooklyn State Hospital: Total appropriations for construction of \$376,200, the principal items of which are an appropriation of \$200,000 for the construction of additional accommodations for patients to complete an authorization of \$300,000 granted in 1917; the appropriation of a balance of \$50,000 for the completion of chronic and reception buildings, authorized by chapter 727 of the Laws of 1915; an item of \$30,000 for a sewage plant for Creedmore and \$10,000 for repairing buildings at Creedmore.

Manhattan State Hospital: Total appropriations for construction of \$170,500, the principal items of which are an authorization of \$100,000 for a new dining-room for 600 patients of which \$70,000 is appropriated and an additional appropriation of \$400,-

Transmitted to the Legislature January 9, 1918

[Vol. 14]

000 for additional accommodation for 380 patients of which \$50,000 is appropriated.

Appropriations under the jurisdiction of the Hospital Development Commission are recommended for the development of plans and studies by the State Architect and State Engineer and by special committees of the Hospital Development Commission for the following: Psychopathic Hospital, State Hospital at Creedmore, Central Islip State Hospital, Kings Park State Hospital, Utica State Hospital, Marcy Division.

The principal appropriations recommended for the charitable institutions are those for continuing the development of Letchworth Village inaugurated by the authorizations and appropriations for last year. For these purposes I recommend a total of appropriations of \$605,500.

THE FORM OF THE APPROPRIATION BILL

I repeat this year the request which I made in my Budget Estimate last year that the appropriation bill, as approved by the Legislature, follow the form of my Tentative Appropriation Act, by carrying in one place in the bill the appropriations for each department, institution or unit and showing extension totals for each subdivision and class of expenditure together with totals for each department or unit. While the appropriation bills, as passed by the Legislatures of 1916 and 1917, included the principal features essential to a properly segregated act, they were practically impossible of ready analysis and study by the public owing to the fact that extension totals were not included and also to the fact that in many instances appropriations for the same units of government were placed in different parts of the bill. This form of appropriation makes difficult, except for those who have adding machines and a corps of clerks available, any study of the bill itself or a comparison of its allowances with previous appropriations.

The legislative bill in those features to which I have called attention follows a legislative custom which had little to recommend it and because of those features defeats the full accomplish-

[Vol. 14] Transmitted to the Legislature January 9, 1918

ment of the purposes of segregated and classified appropriations otherwise excellent in form as accepted by the Legislature for the past two years.

I again ask favorable consideration of a recommendation made last year under this heading, namely— that allowances for construction or repairs, except where needed for emergency work, should become available as of the first day of the fiscal year; also that where increases in the personal service over allowances in my Tentative Appropriation Act are submitted to me in a legislative bill, that the existing salary of each employee so increased be set forth in one item and the proposed increase in compensation be set forth in another item immediately following.

HIGHWAY MAINTENANCE

The appropriations for the maintenance and repair of State and county highways recommended in my Tentative Appropriation Act aggregate \$5,400,000 for the nine divisions of the departmental maintenance work of the State. The recommended appropriations are \$775,000 greater than the allowance for the same purposes by the Legislature of 1917, but with the advanced prices of all materials and labor, I am informed the increase represents the power to purchase little, if any, more actual work than was obtainable under the previous appropriation.

While I have not given favorable consideration generally to those appropriations which will call large groups of men from the fields of industry directly contributing to the success of the war, I feel that such maintenance of our State highways, as is necessary to prevent their deterioration, is of vital importance under existing conditions of partial failure of our railroad transportation.

By recommending liberal appropriations for the purchase and rental of maintenance and repair plant, and by making all the maintenance appropriations available for departmental labor, I have encouraged the idea that much of the work on State roads should be done by gangs of State employees rather than depend upon contractors as has heretofore been the practice for the heavier kind of repair and reconstruction. I am also of the opinion that

Transmitted to the Legislature January 9, 1918 [Vol. 14]

the work of these gangs could be so regulated by the Division Engineers as to release the men when needed, both for the planting and harvesting season in the farming districts, without seriously interfering with the departmental work. If that could be done, the organization of these gangs could be made a great aid to the food production of the State while at the same time assuring proper maintenance of our highways.

COMPARATIVE STATEMENT AND ESTIMATE OF THE STATE COMPTROLLER

I attach to this Budget Estimate and make a part thereof a statement of the State Comptroller marked as follows:

Exhibit A

Comparative statement furnished by the State Comptroller of the actual and estimated revenues, receipts and expenditures for general purposes of government for the three years and nine months ending June 30, 1918, together with statement of estimated resources to meet general budget appropriations of the Legislature of 1918.

STATISTICAL STATEMENTS ATTACHED TO THIS BUDGET ESTIMATE

For the purpose of placing before the Legislature in condensed form, information of value in studying both the Compilation of Desired Appropriations and the Tentative Appropriation Act, which I transmitted to the Legislature with my annual message on January 2, 1918, as well as information with respect to appropriations of the Legislatures of 1915, 1916 and 1917, I have added to this document the following exhibits:

Exhibit B

Comparison by class of expenditure of the appropriations included in the Governor's Tentative Appropriation Act to the Legislature of 1918, with the appropriations by the Legislature of 1917, and with appropriations desired from the Legislature of

[Vol. 14] Transmitted to the Legislature January 9, 1918

1918 by the various departments, institutions and officers of the State.

(A — Appropriations for current and regular expenses.)

(D — Appropriations for deficiencies.)

(S — Special Appropriations.)

Exhibit C

Recapitulation of Exhibit B.

Exhibit D

The departmental totals of the Governor's Tentative Appropriation Act for 1918-19 collated into parts comparable with the Legislative Appropriation Act of 1917.

Exhibit E

Appropriations of the Legislature of 1915 and 1916; also appropriations of the Legislature of 1917 compared with the departments' requests for 1918-19; appropriations recommended in the Governor's Tentative Appropriation Act of 1918, all shown by departments and institutions and by functional groups.

CHARLES S. WHITMAN.

COURT OF CLAIMS

WILLIAM J. BEARDSLEY v. STATE OF NEW YORK

No. 14609

(Decided November 27, 1917)

In computing the fees that should be allowed a supervising architect for his expenses and services in designing and constructing a State prison for the State of New York the basis of the amount that can be allowed him stated. What allowance should be made to the architect in such case where after the beginning of the work in one location the State changes the location of the proposed institution to another portion of the State.
Claim not barred by Statute of Limitations.

The State, by chapter 718 of the Laws of 1905, authorized the Governor to appoint a commission to inquire as to the most practical method of providing modern prison buildings for the occupation by and care of prisoners of the State. Such a commission was duly appointed and made its report to the Legislature in 1906, recommending a new prison to take the place of Sing Sing, outlining its location so that it should be located south of Poughkeepsie. Under the recommendation of the commission the Legislature enacted chapter 670 of the Laws of 1906, establishing a new State prison in place of Sing Sing, to be erected on a site to be thereafter chosen and creating, to carry this proposition into effect, a commission to be known as the Commission on New Prisons. This commission selected as the site of the proposed prison Bear Mountain, located near Iona island, on the west bank of the Hudson river, containing about 500 acres of land and crossed by the West Shore railroad upon the river frontage.

In furtherance of the new project the Legislature, by chapter 521 of the Laws of 1907, amended chapter 670 of the Laws of 1906 by increasing the powers of the Commission on New Prisons and providing for the preparation of the site and grounds by convicts transferred from other prisons to do the necessary work of building, grading and excavating. This statute also directed the State Architect to advertise for designs, plans, specifications and estimates for the construction of the necessary buildings. The claimant herein, William J. Beardsley, duly entered into the competition called for under the law and was the successful competitor. In June, 1908, he began his work on the prison site at Bear Mountain and was subsequently directed to prepare working drawings, etc., for

the entire prison plant excepting three buildings and a wall. His plans were accepted by the Commission which in November of that year entered into a written agreement with the claimant which is set forth in the findings.

In 1910 the Commission adopted a resolution directing claimant not to do any more work of a permanent nature at Bear Mountain and thereafter that site was acquired by the Palisades Park Commission and a new site chosen for the proposed prison. Chapter 365 of the Laws of 1910 gave authority to the Commission to seek a new site for the new prison and to discontinue the construction of that at Bear Mountain. Under this statute the Commission on New Prisons selected Wingdale as a site for constructing the prison plant and this site was acquired June 9, 1910. The contract for the construction of the prison plant with the exception of six buildings was awarded to the P. J. Carlin Construction Company for \$2,196,000, together with an additional sum of \$698,000 if these six buildings were erected by the contractor. In connection with the Carlin contract the claimant had done a great deal of professional work in regard to both the Bear Mountain and the Wingdale sites, but in April, 1912, the members of the Commission resigned as the result of the opposition of the Governor to the Wingdale location. There being then practically no commission the Carlin Construction Company, which had done work upon the Wingdale proposition, ceased work because its bills had remained unpaid.

The Commission on New Prisons on November 21, 1911, adopted a resolution directing said claimant to stop all work for the Harlem prison at Wingdale. In the spring of 1912 the contractor recommenced work on the construction at Wingdale and on May seventh claimant checked up on this work and furnished the Carlin Construction Company a certificate on the estimate. The claimant's contract with the State was in effect from the time that the construction company ceased work until the passage of the Sage bill (Laws of 1916, chapter 594) and during such period claimant was ready and willing to complete his services under the contract. The various sums paid to him by the State as his commissions in connection with the new prison are specifically set forth in the findings of fact.

Held, that there is a balance due to claimant from the State of New York for services rendered, money expended and damages suffered in the sum of \$41,107.26; that the Statute of Limitations has not become a bar to any of the items in the report herein found to be due and owing from the State to the claimant. As the damages allowed in the report were unliquidated no interest has been allowed until judgment is entered upon the report.

CLAIM against the State of New York arising from the failure of the State to pay William J. Beardsley, superintending architect,

for services rendered as such architect in connection with a proposed new prison on Bear Mountain and at Wingdale.

The matter of this claim was referred by the Court of Claims to Judge Albert Haight, as official referee, and after full investigation Judge Haight filed with the court his formal report as follows:

To the Honorable, The Court of Claims of the State of New York:

GENTLEMEN.—On the 27th day of February, 1917, your Honorable Court, by an order of that date, appointed me official referee to hear, try and determine the issues involved in Claim No. 14609, filed by William J. Beardsley against the State of New York, which order and claim are on file in the office of the clerk of your Honorable Court. On the 5th day of April, 1917, at the time and place appointed for the trial of the issues involved in the aforementioned claim, there appeared before me as referee, at the Education Building in the city of Albany, the claimant, William J. Beardsley, attended by his counsel, Ainsworth, Carlisle & Sullivan, and on behalf of the State there appeared the Attorney-General, Hon. Egbert E. Woodbury, by Harold J. Hinman, Esq., and Henry P. Nevins, Esq., Deputy Attorneys-General. Thereupon the oath of the referee, prescribed by law, was waived by the stipulation of all of the parties, and the trial of the case then commenced and continued from time to time upon divers subsequent days by adjournments agreed upon by the parties, and at the times and places specified in the minutes, in the city of Albany, city of New York, and at my office in the city of Buffalo, until the evidence was closed and the case finally submitted to me by the attorneys at my office in the city of Buffalo on the 25th day of September, 1917, but with the reservation that briefs may be thereafter filed, which briefs were finally received by me on the 13th day of November, 1917.

Now, after hearing John N. Carlisle, Esq., attorney for claimant, and Henry P. Nevins, Esq., Deputy Attorney-General, on behalf of the State, and due deliberation having been had upon the questions involved, I do find and decide as follows:

FINDINGS OF FACT

The findings of fact in substance were as follows:

I

The Legislature of the State of New York, by chapter 718 of the Laws of 1905, passed an act authorizing the Governor of the State to appoint a commission of five citizens to inquire as to the most practical method of providing modern prison buildings for the care and occupation of the prisoners of the State. Pursuant to such statute, the Governor appointed the State Superintendent of Prisons, C. V. Collins; Ex-State Treasurer John G. Wickser, Edwin C. Holler, Dr. Samuel J. Barrows and Hon. William E. Wheeler, a former member of the Legislature, as such Commission, who after investigating the subject, made a report to the Legislature in 1906, in which the Commission recommended a new prison to take the place of Sing Sing, and that it should be located south of Poughkeepsie on a site of not less than 500 acres, located with a view of having proper water supply, good drainage, and both water and railway communication.

II

Pursuant to the recommendation of the Commission, mentioned in the above finding, the Legislature, by chapter 670 of the Laws of 1906, passed an act establishing a new State prison to take the place of Sing Sing prison on a site to be thereafter selected, and empowered the Governor to appoint a commission of not less than three nor more than five persons to carry into effect the provisions of the act, which Commission was to be known as the Commission on New Prisons, and it was authorized to appoint one of its members president, and also to elect a secretary and employ necessary clerical assistance and fix their compensation. It was further made the duty of such Commission to select a suitable site for such new State prison to contain not less than 500 acres in the eastern part of the State, south of Poughkeepsie; to prepare the grounds so purchased for use as a site for a State prison plant;

to provide a temporary water supply to be available during the work of construction; to determine what buildings are necessary to be erected thereon in order to prepare the same for use as a State prison, and to act as a board of managers in the erection of such buildings and in the expenditure of all moneys herein or hereafter appropriated to the purchase and improvement of such site, and further that prison labor shall be employed in such work of preparation and construction as far as practicable. Pursuant to such statute, the Governor appointed a Commission of five persons, who duly qualified and entered upon their duties as such Commissioners, and thereupon selected the Bear Mountain site located near Iona island on the west bank of the Hudson river, containing about 500 acres of land and crossed by the West Shore railroad upon the river frontage.

III

The Legislature, by chapter 521 of the Laws of 1907, amended chapter 670 of the Laws of 1906 by adding to the duties of the Commission on New Prisons the power to erect a temporary barracks for the custody of prisoners transferred from other prisons and directing them to build temporary barracks, barns, shops and stockade; necessary grading and excavating; the purchase of material for all such work; the grading and instruction of prisoners employed thereon; the purchase of necessary tools, implements and supplies; the superintendence of such work; and the preparation of plans, specifications and estimates; \$125,000 in addition to that which had been before appropriated, or so much thereof as may be necessary, was appropriated for the carrying on of the work. The Legislature further provided that the State Architect shall make, under the directions of the Commission, floor plans of the building which it shall determine necessary to erect on such site, showing in a general way their requirements. When such plans shall have been prepared the said Commission shall give notice by advertisement in not less than five daily newspapers published in the State that the furnishing of designs, plans, specifications and estimates for the construction of

such buildings which shall be of such fire proof construction as the Commission shall determine and not to cost in the aggregate more than \$2,000,000 and intended to meet the requirements of a State prison plant capable of housing not less than 1,400 prisoners and furnishing necessary shops for their industrial employment and such other buildings as the Commission may determine to be necessary, open to public competition. The act further provided for the making of necessary rules and regulations governing such public competition, for the selection of the plans and specifications, and for an award to the successful competitor.

Pursuant to the foregoing act, the Commission on New Prisons did prescribe rules and regulations governing the competition for architectural designs, plans, specifications and estimates for the construction of such new prison plant, specifying therein nineteen buildings with prison wall required to be erected on such site, together with the capacity, requirements, and approximate floor space of each, provided that the author of the design determined to have the highest merit should be appointed architect of the building and that he would be paid the customary fee therefor, as set forth in the schedule of minimum charges theretofore established by the American Institute of Architects. The successful design became the property of the State; the only compensation for it should be the appointment of the author as architect.

IV

The Legislature, by chapter 214 of the Laws of 1908, authorized the Commission on New Prisons to employ the author of the plans receiving first award as architect, and to revise the details of said plans, to supervise the erection of said buildings and to perform such other duties in connection with the erection of such buildings as the Commission shall determine.

V

The claimant, with thirty-three others, entered into competition, submitting maps and drawings for the new prison, con-

sisting of sixteen sheets, together with detailed specifications of material, labor, apparatus and devices throughout the construction of said buildings, together with a description of said proposed prison plant; also detailed estimates of all work and cost. The plans and specifications so submitted by the claimant were subsequently determined to have the highest order of merit and were duly accepted by the Commission, and the award thereunder was made to him on or about June 27, 1908, and thereupon the new Commission of Prisons adopted a resolution that the claimant as the author of the plans, designated as first choice, be employed to revise the details of said plans, to supervise the erection of the building of the new State prison to take the place of Sing Sing in accordance therewith, or as may be modified by the Commission, and perform such other duties as architect in connection with the erection of such buildings as the said Commission shall determine, and on the same day the Commission adopted a resolution making the claimant the superintendent of the work on the site.

VI

On June 30, 1908, thereafter, the claimant, pursuant to direction and resolution of the Commission, began work on the prison site at Bear Mountain, clearing the site by means of convict labor, which work included the erection of temporary barracks and stockade for the convicts, the cutting of timber, building of roads, constructing temporary water supply, temporary sewerage and remodeling of buildings on site for the occupancy of convict laborers and guards.

VII

On October 5, 1908, claimant was by resolution of the Commission authorized to prepare working drawings and specifications of the entire prison plant on plans approved by the Commission, excepting the hospital, recreation building, warden's residence and wall. He, therefore, prepared contour maps of the Bear Mountain site, preliminary studies, working drawings and specifications for Bear Mountain prison, consisting of forty-six sheets

of preliminary studies and sixty-two sheets of working drawings, which were submitted to the Commission and were approved by it.

VIII

On the 13th day of November, 1908, the new Prison Commission, as party of the first part, entered into a written agreement with the claimant, as party of the second part, the exact terms of which are given in this finding.

At a regular meeting of the Commission on New Prisons of the State of New York, appointed pursuant to law, which meeting was regularly called and held at Sing Sing prison, Ossining, N. Y., on the 13th day of November, 1908, at which were present Charles F. Howard, Cornelius V. Collins, Samuel J. Barrows, Elisha M. Johnson and Thomas W. Hynes, due notice having been given to all the members.

The following resolutions were adopted:

"Resolved, First, That a contract be made and entered into in writing by said Commission and said William J. Beardsley, and that he be employed as architect to make plans and specifications and superintend the work of building the New State Prison for the State of New York upon the site selected by said Commission in Rockland county, and that said contract entered into shall be in form as the contract marked 'Contract Between the Commission on New Prisons and William J. Beardsley,' filed with said Commission and endorsed by its secretary; and

"Resolved, Second, That the president and secretary of said Commission sign and execute said contract for said Commission.

"A true copy.

GEO. McLAUGHLIN,

"Secretary."

IX

The Legislature, by chapter 447 of the Laws of 1909, among other things, provided that there should be appropriated the sum of \$150,000, or so much thereof as may be necessary, for the purpose of doing the preliminary work of preparing the site of

such new prison, for the maintenance and guarding of prisoners, etc., and for the additional amount required to grade a side track at West Shore railroad, for grading the site and constructing roads thereon, and for other necessary work to carry into effect the provisions of this act. It also provided that the Commission is hereby authorized to enter into a contract for the erection and completion of such prison plant upon terms believed by the Commission to be most advantageous to the State, at a total cost not exceeding the sum of \$2,000,000 for the buildings and for the heat, light and power equipment, not including the grading or other preliminary work, or the cost of the site, or architectural supervision, or for so much of said plant as can be constructed for said sum. The act further provided that the previous acts of the Commission in employing an architect who has submitted plans are hereby legalized, ratified and confirmed, and the Commission is hereby authorized to extend its employment to cover the additional expenditure herein authorized. It also provided that the Commission is authorized to employ prisoners to do so much of the labor in the construction of the plant as in its judgment will be to the advantage of the State.

X

On January 21, 1910, the Commission, by resolution, directed claimant not to do any more work of a permanent nature at Bear Mountain site that would need to be undone in case of removal, and thereafter the Bear Mountain site was acquired by the Palisades Park Commission and a new site for the erection of the prison plant was acquired.

XI

When the change from the Bear Mountain site was determined, no contract for the erection of buildings at Bear Mountain had been made, or any of the permanent buildings embraced in the plans and specifications had been constructed, but under the directions and resolution of the Commission, the claimant had by the means of convict labor cleared the site, built roads,

erected temporary structures for the accommodation of convicts during construction, and had made contour maps, plans and specifications for grading, had erected an ice house and dam and had constructed a temporary bake shop, repairs of the warden's residence, stable, temporary power house and power plant, a temporary water supply system, a trolley road system, an electric light plant, railroad siding, including rock excavation and grading, drafting and designing and purchase of a bridge, purchase of tools and machinery, supervision of repairs to prison boat, purchase of supplies for convicts, and had general superintendence of all preliminary work at said site.

XII

At a meeting of the Commission on July 7, 1908, at which the claimant herein was present, the claimant herein stated that the man whom he would have on the premises could do all the superintending necessary this year, without additional expense to the State; if he superintended this preliminary work the only cost to the State would be the regular fees as architect (which is 5 per cent on the cost of this work), this to include the building of a trolley line. At that same meeting Commissioner Johnson moved that the superintendence of the work on the site until further notice be under William J. Beardsley as architect; the motion having been duly seconded by Commissioner Hynes, was carried. Thereupon, in answer to a question of one of the Commissioners as to the work that he thought should be done during that season, he stated in substance that "he would recommend the clearing of the land on the site, the construction of a trolley line, including a temporary power house, the construction of a reservoir for the water supply, arrangement with the railroad company for a dock and side tracks, the building of a section of a shop and the removal of the old ice house;" he stated that he would furnish an estimate of the cost later. That pursuant to the offer of the claimant so made and accepted by the Commission, the claimant did continue the supervision of the work of the clearing of the site and the construction of the temporary structure

required until the termination of the work upon the Bear Mountain site, as hereinbefore stated.

XIII

That from time to time he made reports to the Commission of the cost of the work performed, the amount of which was audited by the Commission and paid, together with his 5 per cent commission upon such cost; that the amount of the commission so paid to him amounted in the aggregate to \$4,755.55; that from time to time thereafter the claimant made further reports to the Commission and estimates of expenditures, on which his commissions of 5 per cent have not as yet been paid, and which amount in the aggregate to the sum of \$279.26.

XIV

Chapter 365 of the Laws of 1910, which became a law May 26, 1910, directed the Commission to select a new site for the new prison and to discontinue the construction of a prison plant at Bear Mountain. All existing laws in relation to the preparation of the site for a prison plant and the construction thereof, and the powers and duties of the Commission in regard thereto were made applicable to the new site to be selected. The existing provisions of law providing plans for such new prison plant and authorizing the employment of the architect whose plans received the first choice to superintend the construction of such prison were made applicable to the construction of a prison plant upon the new site. It was further provided that the new plant should be in substantial compliance with the plans selected by the Board of Award as its first choice, except as the same may be modified. At that time no contract had been let for the construction of the permanent buildings constituting the plant at Bear Mountain, but the claimant had prepared the working plans for the buildings, nineteen in number, contemplated by the original drawings, together with the specifications, and had performed all work necessary to be done by him preliminary to the letting of the contract for the building of the buildings at Bear Mountain.

XV

Pursuant to chapter 365 of the Laws of 1910, the Commission on New Prisons selected the Wingdale site for the construction of the prison plant, which site was acquired by the State on or about June 9, 1910, and thereupon by direction of the Commission claimant prepared contour maps of said site and made test borings and test pits to determine the location of buildings and the requirements for foundations, prepared detailed sheets showing core borings and reported thereon to the Commission on August 25 and September 26, 1910.

XVI

By chapter 447 of the Laws of 1909, the Legislature increased the limit to which the New Prison Commission was authorized to expend in building the prison plant from \$2,000,000 to \$2,200,000, and thereafter and on the 26th day of September, 1910, the claimant entered into a supplemental contract with the State, of which the report contains a copy.

XVII

Pursuant to the above-mentioned contract and the resolution of the Commission, the claimant prepared new working plans and specifications for all of the buildings required for the entire prison plant, excepting the isolated hospital, which were duly approved and the Commission adopted the plans for the construction of the prison plant at Wingdale site on October 29, 1910.

XVIII

Claimant prepared and submitted to the Commission a detailed estimate of cost of construction of the buildings embraced in the foregoing plans and specifications and advised the Commission that all of said buildings could not be constructed for \$2,200,000, and the Commission then determined to ask for proposals for construction of all the buildings, with alternate bids submitted as to separate estimates for deduction from the cost of the entire plant, covering 1, warden's residence; 2, recreation building; 3, south

industrial shop; 4, store house; 5, chapel; 6, condemned and punishment prison.

XIX

Thereupon claimant prepared for the Commission at its direction advertisements and proposals for contractors to submit bids for the construction of said buildings, provided in said proposal for bids for the completion of all the buildings and alternate bids submitted as to separate estimates for the deductions covering the six buildings referred to. The P. J. Carlin Construction Company submitted the lowest bid as follows: For the construction of all the buildings embraced in the proposal, \$2,894,000, with separate estimates of deductions for *first*, warden's residence, \$49,000; *second*, recreation building, \$45,000; *third*, south industrial shop, \$234,000; *fourth*, store house, \$88,000; *fifth*, chapel, \$113,000; *sixth*, punishment prison, \$169,000.

XX

Pursuant to resolution of the Commission, the contract for the construction of the said buildings described, less the warden's residence, recreation building, south industrial shop, store house, chapel and condemned and punishment prison, was awarded to P. J. Carlin Construction Company for the sum of \$2,196,000, and thereafter and on December 28, 1910, a contract between the State of New York, acting through the Commission on New Prisons, and P. J. Carlin Construction Company, was entered into; this contract provided for completion by August 30, 1913, and also provided that the contractor would within said time erect the six buildings for which separate bids had been made in its proposal for the additional sum of \$698,000, if the Commission gave notice of such requirements by August 30, 1911. The Legislature never made an appropriation for the construction of the six buildings omitted from the contract, and consequently the Commission did not give notice to the contractor to proceed with the construction thereof.

XXI

Beginning with January, 1911, claimant staked out the buildings, established the bench marks for heights and furnished a structural engineer and superintendent of construction at the site, who supervised all of the work of the contractor. The contractor in 1911 placed the foundations of the north industrial building, blacksmith shop, and foundations for the boiler house stack and excavation for the cell house, and continued construction with certain intervals of suspension granted by the Commission until April, 1912. Claimant prepared and certified monthly estimates for the contractor, amounting in the aggregate to about \$50,000, and furnished to the Commission daily reports of all of said construction from May 6, 1911, to May 9, 1912.

XXII

In April, 1912, the members of the Commission resigned, due to a difference of opinion between the Commission and the Governor as to the merits of the Wingdale location, and the advisability of continuing the construction of the prison at that site and the refusal of the Governor to approve of appropriations made therefor by the Legislature; that by reason of such vacancy in the Commission the estimate of the Carlin Construction Company, certified by claimant May 9, 1912, remained unpaid, and thereupon the Carlin Construction Company ceased work upon the contract and subsequently was awarded a judgment in this court for its damages and for a breach of the contract by the State.

XXIII

When the Carlin contract was executed, claimant proceeded, under the direction of the Commission, to make detail drawings for the different parts of the buildings, including the construction features, finish and detail work required under the specifications forming a part of the Carlin contract, consisting of ninety-one sheets; they were fully executed and furnished prior to November 21, 1911.

XXIV

Prior to November 21, 1911, the claimant had received from the contractor all of the shop drawings required to be made under the specifications for all of the buildings, including the six buildings covered by the option in the Carlin contract, had checked over all shop drawings and plans, made all necessary amendments and alterations thereon, finally approved the same and furnished the contractor and the State Architect with a copy thereof.

XXV

The foregoing services of claimant substantially completed all work under his contract in connection with the construction embraced in the Carlin contract, including the six buildings covered by the option, except architectural supervision of the balance of the construction of the buildings under the contract.

XXVI

At a meeting of the Commission on New Prisons held at Sing Sing prison, November 21, 1911, the following resolution was adopted:

"Resolved, That Mr. Beardsley be directed to stop all work on plans and all architectural work for the Harlem prison at Wingdale until further notice, and the secretary be directed to so notify him in writing."

Subsequently, the clerk of the Commission served upon the claimant herein the notice specified in the above resolution, and thereupon the claimant continued his engineer, Mr. Smith, upon the plant in charge of the office and the property of the State until the meeting specified in the next finding.

Thereafter, and in the spring of 1912, the contractor recommenced work upon the construction of the plant at Wingdale, and on May seventh claimant checked up this work, passed on Carlin's application for estimate, and on May ninth furnished the contractor certificate on the estimate. Carlin's work ended at this point, as the estimate was not paid, the Commission having resigned.

XXVII

After the meeting of the Commission referred to in the last above finding, the claimant pursuant to a direction of a sub-committee appointed at that meeting, maintained an engineer and superintendent at the Wingdale site in charge of the office occupied by the claimant, who rendered daily reports to the Commission, supervised all construction of the Carlin Construction Company, prepared and certified estimates therefor, took daily water readings and reported thereon to the Commission, and after the Carlin Company stopped work inventoried, stored and protected the property and materials of the State at the site, and with the aid of a farmer employed by the Commission took charge of and preserved the property of the State thereon until September, 1912, nine months, of the value of \$100 per month, making a total of \$900; that such services were proper and necessary.

XXVIII

From the time that the Carlin Construction Company ceased work upon the site and until the passage of the Sage bill (Laws of 1916, chap. 594), which became a law May 19, 1916, claimant's contract with the State was in effect, and throughout such period claimant was ready and willing to complete his services under the contract.

XXIX

During the intervening period mentioned in last above finding, the claimant attended the meetings of the various Commissions on New Prisons, prepared estimates for said Commissions and the Legislature for proposed continuance of the construction of said prison plant, attended upon the Commission and committees of the Legislature at the Wingdale site and other proposed locations, and appeared before the legislative committees and the Governor with and in behalf of said Commission.

XXX

Upon the passage of the act of 1916, above referred to, the duly constituted State authorities having control of the subject matter declined to continue the services of the claimant further as archi-

test for the construction of the new prison and thereupon he elected to treat his contract for such construction as broken by the State, and within the statutory time thereafter filed and served upon the proper authorities the claim herein under consideration.

XXXI

For the preparation of working plans and specifications, preparation of proposals for bids, receiving bids and checking the same, services in awarding the contract, preparation of detail drawings, checking shop drawings for the work embraced in the proposal and contract of the Carlin Construction Company, and supervision of the construction done, claimant earned and was entitled to be paid the amount of 5 per cent on the total cost of constructing the buildings embraced in the contract of the Carlin Company, \$2,196,000, less what it would have cost the claimant for furnishing architectural supervision for the balance of the construction of the buildings under the Carlin contract.

XXXII

The cost to the claimant for furnishing architectural supervision and all remaining services required by his contract for the balance of the construction of the plant under the Carlin contract would have been \$11,250.

XXXIII

The claimant was paid on account of his commissions under the contract for constructing the plant: September 18, 1908, \$10,000; January 23, 1909, \$10,000; December 7, 1909, \$20,000; June 6, 1910, \$15,000; making a total of \$55,000. At the time his second contract was executed, changing the site of the plant from Bear Mountain to Wingdale, for the revision of plans for such change he was paid, November 11, 1910, \$30,000; and on December 23, 1910, he was paid \$10,880. Eliminating from such payments the \$30,000 paid for the change of the plans, there was left as applicable upon his contract for commissions the sum of \$65,880. The claimant's commission upon the amount of the

contract as let to the Carlin Construction Company, \$2,196,000, at 5 per cent would be \$109,800. Deducting therefrom the cost of completing the contract, \$11,250, would leave \$98,550. Deducting the amount paid, \$65,880, from that would leave \$32,670 balance due claimant on contract.

XXXIV

Upon the request of the Commissioners, the claimant caused photographic copies to be taken of the prison plans prepared by him for the Bear Mountain site and procured the same to be bound in book form and presented to the Commissioners and State officers; that the cost of such photographic copies paid by him was the sum of \$281.

XXXV

The claimant, upon direction of the New Prison Commission, prepared and furnished to the Commission water color sketches of the proposed prison plant and buildings to show the effect of the use of gray brick for exterior construction, in order to enable them to determine whether gray or red brick should be used in the construction of the buildings of the plant; the value of such services was the sum of \$700.

XXXVI

At the request of the Commission on New Prisons, the claimant prepared and furnished to the Commission blanks for the making of estimates for the work at the Bear Mountain site, for which services the value and cost was thirty dollars.

XXXVII

At the request of the Commission on New Prisons, the claimant made an inventory of the tools, machinery and property located upon the site of Bear Mountain when purchased, making an estimate of their value, in order to enable the Commission to determine as to whether the same should be purchased or not. The value of such services was \$200.

XXXVIII

After the work at Bear Mountain had ceased, at the request of the Commission, the claimant caused an inventory to be made of all the property, material, machinery, tools, supplies and equipment owned by the State at Bear Mountain, with the valuation of the same, which services were of the value of \$1,000.

XXXIX

At the request of the Commission on New Prisons, the claimant made three trips to Dannemora prison to confer with Dr. Ransom, in charge of that prison, with reference to certain plans that he advised should be incorporated into those prepared by claimant so far as the hospital was concerned; that each trip took three days, making nine days in all; that in making such trips he bore and paid his own traveling expenses, which, together with the time spent by him, was of the value of \$300.

XL

The claimant, upon the direction of the New Prison Commission, rendered engineering services at Wingdale in making maps and surveys and in constructing a railroad spur connecting the Wingdale site with the Harlem railroad for the receiving of the materials transferred from Bear Mountain, and services in preparing a map and location for a construction railway to be built by the Carlin Construction Company through the site, including negotiations therefor with the New York Central Railroad Company and the State Highway Department; that such services were necessary and were of the value of \$250.

XLI

The claimant, by direction of the Commission on New Prisons, rendered services at Wingdale in making survey, taking levels and preparing maps to change the location of the State highway through the site of the prison plant, and conferred with the State Highway Department at Albany upon the making of such

[Vol. 14]

Court of Claims

change of location, which services were necessary and were of the value of \$500.

XLII

The claimant, at the request of the New Prison Commission appointed by Governor Dix, and also of the Commission appointed by Governor Sulzer, furnished to each member of the two Commissions an additional set of maps, plans and drawings of the prison plant at Wingdale, making ten copies in all, of the value of \$50 per set, or a total of \$500. The providing of the Commissioners with such plans was proper and necessary.

XLIII

The claimant rendered engineering services at Wingdale (subsequent to the awarding of the Carlin contract) at the request of the Governor and under the direction of the Prison Commission, in making test pits and borings upon the site of the buildings to determine the feasibility of substituting concrete pile foundations on some or all of said buildings, made calculations on the redistribution of loads on such foundations, and reported to the Commission thereon, which services were proper and necessary, and were of the fair value of \$2,500.

XLIV

Mr. Beardsley was required to make daily reports of the work at Wingdale and he procured and had printed at the request of the Commission a report book, which cost him six dollars and the postage which he expended in making such reports amounted to sixteen dollars, making in all twenty-two dollars; that said services were proper and necessary.

XLV

The claimant rendered services at Wingdale at the request of the Commission in preparing blank forms, for certificates for payment, deduction and for additional orders, upon which to report work performed on the contract, of the value of twenty-five

dollars each, making a total of seventy-five dollars; this work was proper and necessary.

XLVI

Claimant rendered services at the direction of the Commission, in making an examination of the Brown and Wilcox farms adjoining the Wingdale site, in preparing maps thereof and reporting thereon, including the making of surveys and levels of the property and the water supply from Hammersly lake, upon which the Commission decided to purchase such farms, and that the value of his services were reasonably worth the sum of \$300; that the services so rendered were proper and necessary.

XLVII

All of the claimant's traveling expenses and disbursements have been paid down to and including the 2d day of September, 1911; that thereafter his necessary traveling expenses and disbursements to April 7, 1915, in the performance of his services under the contract, were \$600.

XLVIII

The items of damages herein allowed for, extra services rendered and expenses incurred by the claimant, were incidental to the work of constructing the plant under the contract and within the discretion of the New Prison Commission under the statutes, as fairly construed, and were proper and necessary.

XLIX

There is a balance due to the claimant, William J. Beardsley, from the State of New York for services rendered, moneys expended and damages suffered, in the sum of \$41,107.26.

L

The notice of intention to file this claim was duly filed with the clerk of the Court of Claims and served upon the Attorney-General on July 21, 1916, and the claim herein was duly filed with the clerk of the Court of Claims on September 15, 1916.

CONCLUSIONS OF LAW

I

The contract of the State, through its New Prison Commission, with the claimant, William J. Beardsley, bearing date the 13th day of November, 1908, and the contract between the same parties bearing date the 26th day of September, 1910, are valid and legal contracts and binding upon the State and the claimant, and remained in full force and effect until the passage of chapter 594 of the Laws of 1916 and the refusal of the New Prison Commission to continue the services of the claimant thereunder.

II

The Statute of Limitations has not become a bar to any of the items found in this report to be due and owing from the State to the claimant.

III

All of the items contained in the claim of the architect, that are not in this report specifically allowed, are rejected.

IV

The items of damage in this report allowed for extra services rendered and expenses incurred by the claimant were incidental to the work of constructing the plant under the contracts hereinbefore referred to, and were within the discretion of the New Prison Commission under the statute as fairly construed, and were necessary and proper.

V

The notices of intention to file the claim herein with the clerk of the Court of Claims and upon the Attorney-General were duly filed and served within the time allowed by the statute, and were duly filed with the Court of Claims.

VI

The State of New York is indebted to the claimant, William J. Beardsley, for the balance of commissions unpaid under his

contracts with the State, which is now due and payable in the sum of \$32,670, and he is entitled to judgment therefor.

VII

The State of New York is indebted to the claimant, William J. Beardsley, for a balance due upon commissions for preliminary work performed upon the Bear Mountain site, which is now due and payable in the sum of \$279.26, and he is entitled to judgment therefor.

VIII

The State of New York is indebted to the claimant, William J. Beardsley, for traveling expenses incurred after the 2d day of September, 1911, and before April 7, 1915, in the performance of his services under his contracts with the State, which are now due and payable in the sum of \$600, and he is entitled to judgment therefor.

IX

The State of New York is indebted to the claimant, William J. Beardsley, for incidental services rendered, moneys disbursed and damages incurred, which were necessary and proper, hereafter more specifically enumerated, which are now due and payable in the sum of \$7,558, and he is entitled to judgment therefor.

X

The State of New York is indebted to the claimant, William J. Beardsley, for services rendered by the claimant in maintaining Engineer Smith upon the site to care for and protect the property of the State for nine months, of the value of \$900, and he is entitled to judgment therefor.

XI

The State of New York is indebted to the claimant, William J. Beardsley, for expenses incurred and paid by him in procuring photographic copies of the plans and causing them to be bound in book form for the use of the Commission, in the sum of \$281, and he is entitled to judgment therefor.

XII

The State of New York is indebted to the claimant, William J. Beardsley, for services and expenses incurred by him in preparing water color sketches of the proposed prison plant and buildings to be made, showing gray brick for the exterior construction instead of red brick, of the value of \$700, and he is entitled to judgment therefor.

XIII

The State of New York is indebted to the claimant, William J. Beardsley, for expenses incurred and paid by him, in procuring blanks for the use of the Commission, and upon which to make estimates for the work performed, at a cost of thirty dollars, and he is entitled to judgment therefor.

XIV

The State of New York is indebted to the claimant, William J. Beardsley, for services rendered in making an inventory of the property upon the site at Bear Mountain at the time that it was purchased by the Commission to enable the Commission to determine with reference to the purchase thereof, which services were of the value of \$200, and he is entitled to judgment therefor.

XV

The State of New York is indebted to the claimant, William J. Beardsley, for services rendered in making an inventory of the property upon the Bear Mountain site at the time that the work upon that site was abandoned, of the value of \$1,000, and he is entitled to judgment therefor.

XVI

The State of New York is indebted to the claimant, William J. Beardsley, for time and money expended by him at the request of the Commission in making three trips to Dannemora prison to interview Dr. Ransom with reference to his plans for a hospital, amounting to and of the value of \$300, and he is entitled to judgment therefor.

XVII

The State of New York is indebted to the claimant, William J. Beardsley, for services rendered in making survey and supervising construction of a railroad spur at Wingdale, connecting the site with the Harlem railroad, of the value of \$250, and he is entitled to judgment therefor.

XVIII

The State of New York is indebted to the claimant, William J. Beardsley, for making surveys and procuring the Highway Department at Albany to change the location of the State highway through the site upon which it was proposed to erect a prison plant, of the value of \$500, and he is entitled to judgment therefor.

XIX

The State of New York is indebted to the claimant, William J. Beardsley, for furnishing the New Prison Commission appointed by Governor Dix, and also the New Prison Commission appointed by Governor Sulzer, additional sets of maps, plans and drawings of the prison plant at Wingdale, making ten copies in all, of the total value of \$500, and he is entitled to judgment therefor.

XX

The State of New York is indebted to the claimant, William J. Beardsley, for services rendered in making test pits and borings upon the site of the buildings, for the purpose of determining the feasibility of substituting concrete piles for foundations, by the direction of the Commission and at the request of Governor Dix, which services were of the value of \$2,500, and he is entitled to judgment therefor.

XXI

The State of New York is indebted to the claimant, William J. Beardsley, for services rendered in preparing a book in which to make reports, and having it printed, the cost and postage of which amounted to the sum of twenty-two dollars, and he is entitled to judgment therefor.

[Vol. 14]

Court of Claims

XXII

The State of New York is indebted to the claimant, William J. Beardsley, for blanks procured by him for the making of the reports, in the sum of seventy-five dollars, and he is entitled to judgment therefor.

XXIII

The State of New York is indebted to the claimant, William J. Beardsley, for services rendered in making an examination of the Brown and Wilcox farms adjoining the Wingdale site, and in preparing maps thereof and making surveys upon which the Commission purchased the said farms, which services were of the value of \$300, and he is entitled to judgment therefor.

SUMMARY

Conclusion of law VI	\$32,670 00
Conclusion of law VII	279 26
Conclusion of law VIII	600 00
Conclusion of law X	900 00
Conclusion of law XI	281 00
Conclusion of law XII	700 00
Conclusion of law XIII	30 00
Conclusion of law XIV	200 00
Conclusion of law XV	1,000 00
Conclusion of law XVI	300 00
Conclusion of law XVII	250 00
Conclusion of law XVIII	500 00
Conclusion of law XIX	500 00
Conclusion of law XX	2,500 00
Conclusion of law XXI	22 00
Conclusion of law XXII	75 00
Conclusion of law XXIII	300 00
Total	<u>\$41,107 26</u>

Let judgment be entered in favor of the claimant, William J. Beardsley, against the State of New York for the items aforesaid, amounting to the sum of \$41,107.26.

Attached hereto is an opinion prepared by me which, in so far as it discusses legal questions involved, may be considered as a part of this report, all of which is respectfully submitted.

The opinion submitted in connection with this case by Judge Haight was as follows:

HAIGHT, Official Referee.—William J. Beardsley, the claimant herein, has filed a claim against the State in which he asks for a recovery of judgment of \$201,920, with interest thereon from May 19, 1916, for services rendered by him as an architect in the building of a new prison by the State to take the place of that known as the Sing Sing prison.

The history of the case is quite fully set forth in the Findings of Fact embraced in my report hereto attached, including a reference to the acts of the Legislature pertaining to such prison and the contracts entered into by the State and the claimant herein, and consequently I do not deem it necessary to here repeat them, excepting in so far as it may be necessary to make clear my discussion of the legal points involved and my reasons for the conclusions which I have reached therein.

The first and chief question in the case which I deem it necessary to discuss is as to whether the claimant is entitled to commissions as an architect upon the sum of \$2,894,000, or as to whether his commissions should be computed on the sum of \$2,196,000. The Legislature had created a Commission to locate and construct a new prison in place of the Sing Sing prison. This Commission at first located the site of the new prison plant at Bear Mountain, upon the westerly side of the Hudson river, and had acquired the territory therefor, and then upon notice requested the submission of plans by architects throughout the country for the buildings constituting the new prison plant. Numerous plans by architects were thereafter submitted to the Commission, including plans submitted by the claimant herein, whose plans were finally accepted by the Commission and the contract awarded to him of doing the architectural work and the supervision of the construction of the plant, upon which he was to be paid 5 per cent commis-

[Vol. 14]

Court of Claims

sions upon the cost of the work. His plans included nineteen buildings upon the site at an estimated cost of \$1,996,000, and the act of the Legislature authorizing such contract limited the expense thereof to \$2,000,000. Thereupon, the State, through its Commission, commenced the clearing and grading of the grounds upon which the buildings were to be constructed, utilizing convict labor for the doing of the work under the authority of the Legislature. In the meantime the claimant proceeded to prepare working drawings and specifications for all of the nineteen buildings constituting the plant. After the completion of the working drawings and specifications for the construction of the buildings the Commission abandoned the work upon the Bear Mountain site, and under the authority of the Legislature selected another site for the prison at Wingdale, which the Commission was authorized to construct at an expense not to exceed \$2,200,000. The Commission thereupon entered into another contract with the claimant, under which he changed his plans and specifications for the construction of the buildings constituting the plant so as to conform them to the new site that had been selected and acquired at Wingdale. The Commission then concluded to let a contract for the construction of the plant and the architect was then directed to give notice and to receive bids for the doing of the work in accordance with new working drawings prepared by him, and for separate bids upon six of the buildings constituting the plant. Thereupon, bids were received from various contractors and the contract finally awarded to the Carlin Construction Company, whose bid for the construction of the entire plant was \$2,894,000, but in view of the fact that the Commission was limited in its power to construct the plant to \$2,200,000 it entered into a contract with the construction company to eliminate the six buildings upon which separate bids had been taken, and the contract was awarded for the construction of the other buildings constituting the plant at the sum of \$2,196,000, with a provision that within a specified time, if the Commission should direct the contractor to include the other six buildings, then the work of constructing the same should be done under the contract.

Again, under the provisions of the claimant's first contract,

which was continued in force by his second contract, is the express provision: "If at any time, from changed conditions or other cause, such plans are modified to bring the cost within the two million dollar limit, such changes shall be made without additional compensation." The \$2,000,000 limit had been increased by the Legislature to \$2,200,000. The conditions were changed by substituting the Wingdale site for that at Bear Mountain. This change involved a large additional expenditure of money in excavating for a foundation and for other reasons, which necessitated the change of the plans by eliminating the contemplated buildings so as to bring the contract within the \$2,200,000 limit, and here we find the claimant's agreement that such change may be made without additional compensation to him.

The Legislature, however, never made an appropriation for the construction of such six buildings, and consequently they never gave the notice to the contractor to construct the buildings. After the awarding of the contract to the Carlin Construction Company, the claimant herein proceeded to prepare detail drawings of all the buildings constituting the plant, including the six buildings omitted from the contract, and performed substantially all of the work required of him under the contract, except that pertaining to supervision of the construction by the contractor. The provisions of the contract of the claimant with the State bearing upon the question are as follows:

"It is further mutually agreed that said William J. Beardsley shall receive for all his services in making said plans for such prison plant and supervising the construction of its buildings at such new site the compensation of 5 per cent mentioned in his said contract on the cost of the work."

The question, therefore, arises as to what is meant by the term "the cost of the work." In construing the provisions of the contract, we must bear in mind the provisions of the statute. The power of the Commission is derived from the Legislature and its acts must be construed in connection with the statutes. The Legislature had seen fit to limit the expenditure in the construction of the building of the plant to \$2,200,000. Beyond that sum the Commission had no power to contract or to impose a liability upon

the State. The contract which the Commission had entered into was consequently limited to that sum, and as awarded to the Carlin Construction Company at the sum of \$2,196,000, that sum became the cost of the work had the contract been completed by the contractor and would have been the measure of the amount upon which the claimant could recover commissions. Undoubtedly had the Legislature authorized the Commission to contract for the construction of the additional six buildings, then the claimant would have been entitled to have his commissions upon the amount of "the cost of the work" of such construction allowed him, but such authority of the Legislature was never given, and consequently the Commission had no power to obligate the State for such expenditure. I am aware that there are equities existing on behalf of the claimant with reference thereto. He prepared the working drawings and after the letting of the contract the detail drawings of all the buildings, including the six buildings in question, but at the time of his preparing the detail drawings for the six buildings, he knew that such buildings were not included in the Carlin contract, and that therefore the detail drawings were useless and unnecessary. True, he may have entertained the view that the Legislature would authorize their construction and that then such drawings would become necessary and useful, but he also knew or should have known that the Legislature had in no manner bound itself to authorize the construction of those buildings. He also had made working drawings and specifications for these six buildings before the contract was let and upon which bids were received, but these working drawings and specifications were originally made for the Bear Mountain site before its abandonment. At that time the limitation of the cost of construction was but \$2,000,000, and the estimated cost slightly under that figure. It is true that the working drawings then prepared had to be revised to conform to the Wingdale site, but that revision is covered by the provisions of the contract as follows: "And in addition thereto he is to be paid for extra work in redrafting the *plans and specifications* for such plant and the engineering services in connection therewith made necessary by the change of site from Bear Mountain to Wingdale * * * the sum of

\$30,000." That amount was subsequently paid. I am, therefore, forced to the conclusion that the award to the claimant must be based upon the commissions that he would be entitled to upon the amount specified in the Carlin contract of \$2,196,000.

I have found as a fact in the case that the claimant had substantially performed all of the requirements under his contract up to the time that the Carlin contract was abandoned, in consequence of the fault of the State, except that of supervision of the work of construction thereafter remaining to be done. The claimant gave testimony tending to show that such supervision could have been performed for \$2,500. The evidence, however, on the part of the State is that it would cost a much larger sum. The lowest that the State witnesses placed such cost was \$20,000; \$20,000 may be a little high; \$2,500 a little low. My own judgment is that it should be fixed at \$11,250, which sum should be deducted from the amount of commissions that the claimant is entitled to under his contract.

The question has been raised on behalf of the claimant to the effect that some of the payments made to him, which were credited upon his commissions, were intended to be applied upon his services rendered in the preliminary preparation of Bear Mountain site for the construction of the prison plant, and as I understand the claimant it is to the effect that two payments of \$10,000 each should be so applied. This claim, I think, is not well founded. It appears to me to be completely answered by the claimant's own bill under date of December 23, 1910, Exhibit 126, which is as follows:

"December 23rd, 1910.

"THE COMMISSION ON NEW PRISONS,
"Albany, N. Y.

To

"1910

WILLIAM J. BEARDSLEY, Dr.

"Dec. 21. To payment due on contract for plans
and specifications for New York
State Prison, being 3% on \$2,-
196,000.00, the cost of the work,
as per bid received for same.... \$65,880 00

[Vol. 14]

Court of Claims

Credit

"Dec.	3, 1908, By check	\$10,000	
"Feb	26, 1909, By check	10,000	
"Dec.	16, 1909, By check	20,000	
"July	15, 1910, By check	15,000	
			\$55,000 00
			\$10,880 00

"I hereby certify that the above account is correct and is chargeable to Chapter 365, Laws of 1910, Services, Grading, etc.

"F. B. WARE, *State Architect.*"

Here we have his own understanding of the contract, based upon \$2,196,000, an acknowledgment of the payments made to the credit of his commissions, with a statement of the amount that was due, viz., at that time 3 per cent or three-fifths of the commissions to which he was ultimately entitled, with a balance due him of \$10,880, which bill was approved, paid and receipted by him. In addition we have the recital in his contract which had been entered into before the presenting of bill (claimant's Exhibit 126), in which the claimant agreed that "It is understood that the 5 per cent of the cost of the work, and this additional sum of \$30,000, will constitute the entire compensation of said William J. Beardsley for his architectural and engineering services in the original preparation of plans for said prison plant and the additional work herein specified and the supervision of the construction of such plant, and that the sum of \$55,000.00 heretofore paid to him is to be considered as a payment on account of such services." That the amount of \$55,000 thus admitted by the contract to have been paid as applying upon the architectural work in making plans, etc., together with the \$10,880 thereafter paid, as shown by Exhibit 126, making the total of \$65,880, must be credited upon the amount due him for commissions, and that the balance due him therefor would be the sum of \$32,670, as stated in finding XXXIII in the report.

The next question arises over the claim of the architect for services rendered in the preliminary work done upon the Bear Mountain site. The claimant had succeeded in obtaining the award of the Commission upon his competitive plans and he had been appointed the architect for the construction of the buildings. The site selected, however, for such buildings, occupying about thirty acres, was covered by a forest and had to be cleared in order to make a place for the buildings. Appropriations had been made for the cost of the preliminary work necessary to be performed upon the site, including the erection of a trolley railroad from the station of the West Shore railroad upon the river front up to a point in the mountain where material could be readily delivered upon the site for the buildings. The Commission decided to use convict labor in doing the preliminary work and the maintenance of such labor upon the site necessitated temporary arrangement for water supply, housing, feeding and stockade for the purpose of preventing escapes. At a meeting of the Commission at which the claimant was present, the Commission had under advisement the appointing of a superintendent to take charge of the preliminary work. Thereupon the claimant stated that the men whom he would have on the premises could do all the superintending necessary without additional expense to the State. If he was appointed superintendent of this preliminary work, the only cost to the State would be the regular fees as architect on the cost of the work, this to include the building of a trolley line.

Thereupon, and at the same meeting, the Commission adopted a resolution that the superintendence of the work on the site until further notice should be under William J. Beardsley as architect. He thereupon assumed the duties of superintending the preliminary work upon the ground and supplied the Commission with monthly statements as to the cost of the work performed. He thus became the architect and the superintendent of the preliminary work, with the understanding that his pay therefor should be only the regular fees as an architect, which was 5 per cent upon the cost of the work performed.

[Vol. 14]

Court of Claims

It appears from the books kept by the clerk of the Prison Commission that the cost of the entire work upon the Bear Mountain site up to the time of the abandonment of the work thereon was as follows:

Convict labor account.....	\$59,856 77
Boat account	17,127 24
Transportation account	33,481 36
Repair of buildings account.....	460 73
Warden's maintenance account	770 10
Total	<u>\$111,696 20</u>

It further appears that the convict labor account embraces maintenance of the convicts and everything in connection therewith, buildings to house them, their transportation, payment of guards, food that was purchased for them, anything in connection with the labor of the convicts was charged to convict labor account, including drugs, medicines, clothing, tools, materials and coal used for heating the buildings they were in and in their labor.

The transportation account includes freight, express, horses that were purchased, wagons, anything in the nature of horse equipment, food for the horses such as hay and oats, together with the trolley road and materials purchased in connection therewith.

The boat account includes the purchase of the boat, cost of running and maintaining the boat and keeping it in repair, and labor, such as captain, engineer, etc.

The account for repair and buildings refers to the building upon the site that was repaired, and the account for warden's maintenance covers the time that the warden was maintained upon the site.

As we have seen, the boat account includes the purchase of the boat, \$11,000. This purchase was made by the Commission and the State Superintendent of Prisons. As I understand, the claimant herein had nothing to do with the purchase of the boat, and it should, therefore, be deducted from the total expenditure

above stated, which would leave the total expenditure outside of that expended for the boat, \$100,696.20, upon which the claimant's commission would amount to \$5,034.81. Deducting therefrom the commission already paid to him, \$4,755.55, leaves a balance due on commissions of \$279.26.

It is contended on behalf of the claimant that he did a large amount of labor upon the preliminary clearing of the site at Bear Mountain for the construction of the permanent buildings that were designed to occupy the site, by way of preparing plans for grading and draining the grounds, taking charge of the convicts, making estimates and purchase of supplies, preparing plans for septic tank, for sewage disposal, preparing plans and alterations of existing buildings on the site, planning and erecting housing, lodging and heating buildings for the care of the convicts, the preparation of plans and construction of the trolley railroad, the procuring of temporary water supply and other services of a like nature, amounting in the aggregate to about \$20,000. As architect, it was his duty to prepare all of the necessary plans for the clearing of the site, to supervise the work and to render estimates from time to time of the work performed and the cost of liability incurred. This work the architect rendered faithfully, and with the exception of the sum above specified as the balance due on commissions he has been paid in full his commissions upon the entire cost of such work. I am, therefore, inclined to the view that all of his claims now made of the nature and character alluded to must be rejected, upon the ground that under the arrangement made, he has been paid therefor by way of commissions. There are, however, some items charged that appear to me to be separate and distinct from his duties as an architect, and for which he may be properly allowed to recover.

As we have seen, the claimant had prepared plans for the prison plant, upon which he had been awarded the contract for the construction of the plant as architect. These plans were drawn upon large sheets which were somewhat difficult to handle, and upon the suggestion of the Commission that they could be more conveniently referred to by the members of the Commission

[Vol. 14]

Court of Claims

if they were furnished with smaller size photograph copies, the claimant, acting upon this suggestion, caused the plans to be photographed and bound and copies furnished to the members of the Commission and prison officials. The cost was \$281. It appears to me that the photographing was within the reasonable discretion of the Commission and that the claimant should be reimbursed for the amount paid therefor.

Again, the claimant prepared blanks for the estimating of the work at the site at an expense of thirty dollars. I think the service was proper and that the item should be paid.

The Prison Commission had under consideration the change of the plans by substituting gray brick for the exterior of the buildings to be constructed and requested the architect to furnish a water color sketch of the proposed prison plant and buildings, showing the effect by the use of such gray brick. He rendered this service and has charged the sum of \$700 therefor. I have concluded to find that this item should also be allowed.

At the request of the Commission, the architect made an inventory of all the tools and machinery that were upon the property when the site was purchased, making an estimate of their value so that the Commission could determine as to the advisability of the purchase of such material. His charge for such services was \$200 and I have allowed it.

Again, at the abandonment of the work at Bear Mountain he made another inventory of all of the property and materials, machinery, tools, supplies and equipment owned by the State at Bear Mountain, with the value of the same, for which he charges \$1,000. The amount may be a little high, but there is no other valuation given in the testimony, and I have, therefore, allowed that item.

At the request of the Commission, the claimant made three visits to Dr. Ransom at the Dannemora prison, taking three days for each visit, to obtain from him his views with reference to the construction of a hospital. During these visits he obtained some ideas from Dr. Ransom, which he subsequently incorporated in his plans for the hospital. In so far as the work of revising his plans with reference to the hospital is concerned, I can make

no allowance, for I deem that within the services that he should render under the contract, but for the time, travel and expense from Poughkeepsie to Dannemora, I think I may properly allow him for his time and expenses incurred. He asks for \$300 and I think it should be allowed.

I do not understand that the agreement of the claimant to serve as superintendent in the clearing of the Bear Mountain site above alluded to extended to or has any bearing upon the work performed by him upon the Wingdale site. It consequently follows that his claim upon which he here seeks a recovery for work performed at the Wingdale site must be determined under the provisions of his contract with the State. The provisions of the contract bearing upon the question are as follows:

"Upon complying with the terms and conditions of this agreement * * * the party of the first part has agreed and does hereby agree to pay the party of the second part for and in consideration of such services 5 per cent on the cost of said work as full compensation for all such services; the cost shall be construed to mean the actual cost to the State of the buildings and other improvements over which the party of the second part shall have the supervision and includes all fixtures necessary to render said prison plant fit for occupancy; but shall not include the cost of moving machinery or furniture, unless by further special agreement. In addition to the above the party of the second part shall receive his necessary traveling and incidental expenses to be detailed in writing and audited by the party of the first part and approved by the State Architect herein. The compensation above stated does not cover alterations and additions to contracts after their execution, or to drawings and specifications after the same have been put in final form as above provided, and adopted by the party of the first part after approval by the State Architect and the State Commission of Prisons, except that if at any time from changed conditions or other cause, such plans are modified to bring the cost within the two million dollar limit, such changes shall be made without additional compensation; services for such alterations, when they become necessary, shall be charged for

[Vol. 14]

Court of Claims

according to the time and trouble involved. In case of abandonment or suspension of the work the basis of settlement shall be as follows: preliminary studies, a fee in accordance with the character and magnitude of the work; preliminary studies, working drawings and specifications, three-fifths of the fee for complete service; when the work has been partly done additional fee for supervision, based on the cost of the work up to the time of suspension or abandonment."

Under the second agreement made upon the change from the Bear Mountain site to that of Wingdale, the provision is:

"It is, therefore, hereby mutually agreed that the employment of William J. Beardsley is continued for the purpose of supervising the erection of such prison plant on such new site under the same terms and conditions set forth in said contract dated November 13, 1908, in relation to the construction of the prison plant at Bear Mountain site.

"It is further mutually agreed that said William J. Beardsley shall receive for all his services in making said plans for such prison plant and supervising the construction of its buildings at such new site the compensation of 5% mentioned in said contract on the cost of the work, and in addition thereto he is to be paid for extra work in redrafting the plans and specifications for such plant and the engineering services in connection therewith made necessary by the change of site from Bear Mountain to Wingdale, for test borings, test pits at the Wingdale site, contour survey of such new site, and all other additional work caused by the abandonment of the Bear Mountain and the selection of the Wingdale site, the sum of thirty thousand dollars, to be paid on the audit of the Commission and the approval of the State Architect at such times as the appropriations of the Legislature permit. It is understood that the 5% of the cost of the work and this additional sum of \$30,000.00 will constitute the entire compensation of said William J. Beardsley for his architectural and engineering services in the original preparation of plans for said prison plant and the additional work herein specified and the supervision of the construction of such plant, and that the sum of \$55,000.00 here-

tofore paid to him is to be considered as a payment on account of such services, and that the terms of the contract between the parties hereto above mentioned, dated November 13, 1908, are continued and made applicable to the construction of such prison plant at the Wingdale site without additional compensation, *except as herein stated.*"

Upon the letting of the contract it appears that the claimant was paid an additional sum of \$10,880, which, added to the \$55,000 that he had previously received, made \$65,880, which is three-fifths of the sum of \$109,800, the total amount which he was to receive under the contract; at that time he had prepared the working drawings and specifications for the entire plant and had, therefore, under the provisions of the contract, earned and was paid the full amount then due. Thereafter there remained to be done the preparation of the detailed drawings, the comparing and checking up the shop drawings and the supervision of the work of construction, for which he would be entitled to recover the remaining $\frac{2}{5}$ per cent of the cost of the work. In performance of the contract, I have found as a fact that he had prepared detail drawings, had checked up, revised and approved of the shop drawings, and that the only work remaining to be performed by him pertained to the supervision of construction at the time the contract was broken and the contractor ceased to work thereon.

I have, therefore, reached the conclusion that his measure of damages would be the value of the work performed, that is, commissions upon the entire cost of the plant under the contract, less the cost to him of the supervision of that which remained to be performed by the contractor.

As I understand the claim on the part of the State, it is that the claimant is limited in his right to recover commissions to the amount of work done upon the construction contract, and that in case the claimant proceeded with his architectural work beyond that point, he did so at his peril and cannot recover its value. In this case, as we have seen, all of the architectural work for which claimant now seeks to recover took place before the work was abandoned by the contractor. The claimant is not seeking to

[Vol. 14]

Court of Claims

recover on the contract of the Carlin Company, but under the provisions of his own contract. Under the provisions of his own contract, it was his duty to do all of the architectural work necessary, in order to enable the contractor to proceed with the construction of the buildings under his contract. It, therefore, became necessary and his duty as an architect, after the contract was let, to proceed at once to make detailed drawings of all the materials and parts entering into the construction of the buildings, in order that the contractor may have the different parts fabricated in the shop, to receive the shop drawings, go through them, check them up, and if necessary revise them, so that no mistakes would be made on the part of the fabricator in constructing the parts composing the buildings, all of which necessarily preceded the work of the contractor, and it is the value of these services rendered by the architect that he now seeks to recover. It is undisputed in this case that the plans and work of the architect upon the permanent buildings, with the specifications up to and including the letting of the contract, amounting to three-fifths of the entire commissions under the contract, amounting to \$56,880, had been paid, and that thereafter there remained the detailed drawings and checking and revising the shop plans to be performed by him, together with the watching or supervision of the work of construction. Of course, in so far as the watching of the work of construction is concerned, that service could only be performed with and to the extent that the contractor proceeded with his work. I am, therefore, unwilling to adopt the construction of the contract contended for on behalf of the State.

With reference to the additional claims here presented for allowance, it must first be determined as to whether the services performed by the claimant are covered by the provisions of the contract, upon which he is allowed commissions. If so, then nothing additional can be allowed, and such claims must be rejected. If, however, they pertain to work not covered by the contract, but were for additional services which were necessary, and not required to be performed thereunder, but which were properly ordered by the Commission acting within its powers and juris-

diction, then they should be allowed "according to the time and trouble involved." The grading of the site at Wingdale was not included in the contract for the building of the plant, but was specifically reserved therefrom by the specifications of the architect. The question arises as to whether the plans for the grading of the premises were included in the \$30,000 item, and if it was not, whether the Commission had the power to order such grading without an appropriation therefor by the Legislature.

The claimant seeks to recover the sum of \$15,000 for services rendered at Wingdale in making surveys, taking levels, preparing plans and specifications, setting stakes, laying out terraces, sidewalks, drives and landscape work for the grading of the Wingdale site, exclusive of grading covered by the contract of the Carlin Construction Company. The State contends that this service rendered was included within the \$30,000 item in his second contract, and that he should not again be paid therefor. My conclusion is with reference to this claim that in view of the fact that the grading of the grounds outside of that which was included in the Carlin contract was not at that time necessary in order to enable the contractor to proceed with his work, and of the further fact that no appropriation had been made therefor by the Legislature, the claimant's situation is similar to that in which he was placed with regard to the six buildings excluded from the contract, and what I have herein stated with reference to such exclusion is applicable to this claim and it should be rejected.

In making the above ruling I do not intend to give the statute a narrow construction; instead, I think it should be liberally construed with reference to the powers delegated to the Prison Commission. It is obvious that in the progress of a work of the magnitude of this which the Commission was authorized to conduct, numerous little things may arise which the Legislature could not foresee, in which it was necessary for the Commission to take action in reference thereto, although not expressly authorized by the Legislature. Whatever was necessary to be done should be regarded as within the discretionary and reasonable powers of the Commission delegated by the Legislature.

I have, consequently, allowed several of the claimant's items of

expenditures incurred at Bear Mountain, which are herein referred to, and a number of similar claims for services performed upon the Wingdale site, in which I have concluded that they were necessary, in order that the contractor may be able to proceed with his work under the contract, and which was necessary for the preservation and care of the property upon the plant.

The claimant presents a claim for services at Wingdale in making surveys, digging test pits, preparing maps and designs for dams and storage reservoirs and pipe lines for a permanent water supply system for the Wingdale plant, and taking water readings, and also for the preparation of plans and designs for a permanent sewerage disposal plant connected therewith. The supplying of water and the disposal of the sewerage are two important elements constituting a prison plant. The Legislature, in giving the Commission authority to select and purchase a site for the plant, expressly provided that they should have reference to an adequate supply of water. Provisions for the supply of water and the disposal of sewerage were made at the Bear Mountain site; when that site was abandoned and the Wingdale site selected, it necessitated a change of the plans that had been provided for at the Bear Mountain site so as to conform them to the Wingdale site. The architect thought that he should be allowed $1\frac{1}{2}$ per cent for making such change, and this claim on his part was sanctioned by the Commission, but when it was sent to the State Architect for his approval he objected upon the ground that the prison plant at Wingdale might cost a sum in excess of the \$2,000,000 limit placed upon the plant at Bear Mountain by the Legislature, and advised that a gross sum be agreed upon in lieu of commissions, which sum was fixed at \$30,000, being the commission of $1\frac{1}{2}$ per cent upon the \$2,000,000 limitation imposed by the Legislature. It, therefore, is apparent that the agreement then made for the doing of the work necessary for the change to Wingdale, commonly called the \$30,000 contract, was intended to and did cover the essential plans constituting the plant at Wingdale, and that therefore the additional work now claimed by the architect with reference to the water supply and sewerage disposal should be rejected.

Upon the request of Governor Dix, the Commission directed the claimant to determine the feasibility of substituting concrete piles for a foundation under the buildings at Wingdale and to determine the amount of expense that would be saved thereby. The claimant performed such work and made a report, upon which he bases a charge of \$2,500. The power of the Governor and of the Commission to order this work is questioned, but it appears to me that the Governor, in the discharge of his duty, might properly make inquiry as to whether a more economical way could be provided for the construction of the prison plant than that which had been provided for in the plans and specifications. It was then apparent that the foundation walls at Wingdale were going to cost in the neighborhood of \$250,000, in addition to what such foundations would have cost at the Bear Mountain site, and it appears to me that the Governor was acting within the scope of his authority upon the subject.

The claims presented for cooking utensils, for laundry equipment, for battery and boilers, and for cell cabinets and bunks are rejected for the reasons stated in my opinion with reference to the eliminating of the six buildings in the contract let to the Carlin Construction Company.

It is contended on behalf of the State that all of the items of damages suffered by the claimant are barred by the Statute of Limitations; that the Statute of Limitations commenced to run in so far as the claims arising out of the work performed on the Bear Mountain site at the abandonment of that site; that the statute commenced to run with reference to the claims arising out of the work done upon the Wingdale site on November 21, 1911, when Beardsley was instructed to stop work, or December 13, 1911, when he was warned as to the status of Smith, or April 9, upon the abandonment of the entire proposition by the Governor and the Commission when it resigned.

The contention of the claimant is to the effect that the Statute of Limitations did not commence to run until the passage of chapter 594 of the Laws of 1916. If the claimant's contention is correct with reference to this point, then it is not disputed but

that he presented his claim and caused the same to be filed in the proper offices and instituted these proceedings within the statutory time.

With reference to the question raised as to the running of the statute at the abandonment of the Bear Mountain site, it appears to me that the second contract made between the New Prison Commission and the claimant herein, together with the provisions of chapter 447 of the Laws of 1909, in which the previous acts of the Commission in employing the architect who had submitted the plans "are hereby legalized, ratified and confirmed, and the commission is hereby authorized to extend his employment to cover the additional expenditure herein authorized," completely disposes of the contention of the State as to that question.

The real question in the case doubtless is that raised with reference to the proceedings of the Commission on the 21st day of November, 1911. The facts as bearing upon the contention are embraced in finding No. XXVI of the report and are as follows:

"Resolved, that Mr. Beardsley be directed to stop all work on plans and all architectural work for the Harlem prison at Wingdale until further notice, and the secretary be directed to so notify him in writing."

At the next meeting of the Commission, after the adoption of the above resolution, the claimant attended and explained all of the plans and detail drawings and delivered a set to the Commission and notified them that his work was complete, except the remaining portion of supervision, which required the keeping of his engineer upon the ground. The Commission then discussed Mr. Smith, the claimant's engineer and superintendent at the work, and requested claimant to keep Smith on the site at Wingdale. Thereafter and in the spring of 1912, the contractor recommenced work upon the construction of the plant at Wingdale, and on May seventh claimant checked up this work, passed on Carlin's application for estimate, and on May ninth furnished the contractor certificate on the estimate and had conferences with the contractor, Secretary McLaughlin of the Commission, and the State Architect, in regard to the estimate of Carlin. Carlin's

work ended at this point, as the estimate was not paid, the Commission having resigned.

The circumstances under which the resolution of the Commission was passed to some extent aid us in determining its true meaning and intent. A controversy had arisen between the Governor and the Commission — the Governor apparently entertaining the view that the Wingdale site was not a proper one for the construction of a prison plant, while the Commission entertained the contrary view. The Legislature had made an appropriation and the Governor had threatened to veto any further appropriations made for the continuing of the work. The Commission thereupon adopted the resolution stopping the claimant from doing further work on the plans and all architectural work *until further notice*. He was not stopped from watching the work as it progressed under the contract, or prohibited from checking it up and supervising, or from making an estimate as to the amount of work performed by the contractor. It was not an absolute and permanent stoppage of his work; it was only until further notice, thereby making the stoppage temporary and not permanent. This is further evident from the fact that at the next meeting further arrangements were made by which the claimant should keep an engineer upon the work and take care of the property.

Under the provisions of the first contract made by the Commission with the claimant is the provision: "In case of the abandonment or suspension of the work, the basis of settlement shall be as follows: Preliminary studies, a fee in accordance with the character and magnitude of the work; preliminary studies, working drawings and specifications, three-fifths of the fee for the complete service; when the work has been partly done an additional fee for supervision, based on the cost of the work up to the time of suspension or abandonment."

In this connection it will be recalled that this contract was entered into on the 13th day of November, 1908, long before any contract was let for the construction of the prison plant to the Carlin Construction Company. It was at a time when the Commission contemplated the constructing of the plant by convict

[Vol. 14]

Court of Claims

labor, and therefore the abandonment or suspension referred to in the contract had no reference to any other contract, or the abandonment or suspension of work by a contractor. The abandonment or suspension, therefore, must have referred either to the architect himself, or to the State represented by the Commission. Abandonment or suspension of the work; what work was here referred to? That which follows of necessity answers the question: "Preliminary studies, a fee in accordance with the character and magnitude of the work." Clearly the term "work" here referred to was the work of the architect in his preliminary studies; it couldn't have any reference to work upon a contract in the construction of the buildings, for nothing of the kind had been undertaken preceding the preliminary studies. "Preliminary studies, working drawings and specifications, three-fifths for complete service," and then follows the other provision that when the work has been partly done an additional fee for supervision, based on the cost of the work up to the time of the suspension or abandonment. Possibly the work referred to in the latter clause pertained to the work upon the plant, but not the former. Supervision could only be made as the work of construction progressed. It thus is apparent that the abandonment or suspension embraced in the contract means abandonment or suspension either by the State or by the architect. What does the term abandonment or suspension mean? Does a suspension of work for a day, a week, or some other time operate to avoid the contract? Hardly. No time is specified in the provision. It must, therefore, be deemed to be continuous or permanent abandonment or suspension. No claim has here been made that there was any abandonment or suspension on the part of the claimant, and I am unable to recall any evidence produced upon the trial that shows or tends to show that the State has ever abandoned or suspended its intention to build a prison plant in the place of Sing Sing prison until the passage of the act of 1916. I do not understand that either of the Governors or of the Commissions appointed have ever abandoned or found fault with the plans and specifications of the architect prior to the passage of the above mentioned act. All

the trouble that has arisen between the Commissions and the Governor and the Legislature have grown out of the differences arising upon the location of the site at Wingdale and the additional cost necessitated in the construction of the foundation of the buildings at that site.

The Carlin contract for the construction of the buildings upon the plant was a separate, independent instrument from the contract of the State with the architect. The claimant was not a party to that contract and was not responsible for the controversy that arose with reference to the performance of the work of construction under it. The abandonment of the work under it did not affect him, except in so far as it prevented him from supervising the work as it progressed. His preliminary studies had been completed and his work accepted by the board that was appointed to select the plans upon the competition authorized by the statute. The working drawings and specifications had been fully completed before the letting of the contract to the Carlin Company for the construction of the buildings. The detail drawings had been completed and approved and the shop drawings had been checked up and corrected before the controversy with reference to the site occurred. This all preceded the passing of the resolution of November 21, 1911. That was not a permanent or continuous abandonment of the plans and specifications or the work theretofore done, for it only stopped such work temporarily and until further notice, and the subsequent action of the Carlin Company in abandoning the contract after the Governor had vetoed the appropriation made, therefore only operated to prevent the claimant from supervising the work that remained to be done upon the Carlin contract.

I am, therefore, of the opinion that the Statute of Limitations did not commence to run by reason of that transaction.

Some discussion has taken place with reference to the provisions of the Finance Law. The acts of the Legislature, to which reference has been made, providing for the appointment of a Commission to construct a new prison in place of the Sing Sing prison, are special and local acts, and in so far as such acts are in

[Vol. 14]

Court of Claims

conflict with the provisions of the Finance Law, that law must be deemed to be superseded by the special and local statutes upon the subject.

In the trial of the case I have been exceedingly liberal in the reception of testimony, and quite a number of objections and exceptions were taken with reference thereto. It is the duty of the clerk of a Commission created by the Legislature to keep accurate minutes of the proceedings at a meeting of the Commission. Such minutes ordinarily show the names of the Commissioners present, the motions made and the resolutions passed. It is not customary for the clerk to enter in his minutes of the proceedings all the names of other persons who may be present at the meetings of the Commission, nor is it customary for such clerk to enter into the minutes an accurate copy of all the discussion that took place, and informal talks by the Commissioners. I have, therefore, allowed in some of my rulings oral testimony to be given as to whether certain other persons were present at the meeting of the Commission other than the Commissioners themselves, and where a controversy arose upon the trial as to what was meant by a resolution passed, I have allowed testimony to be given as to the discussion that took place on the occasion of the passage of the resolution by the Commissioners themselves, in order that I might reach a proper conclusion as to the purpose and intent of the resolution. I have not intended to receive any evidence for the purpose of contradicting the minutes kept by the clerk. There may be some other rulings admitting evidence which should not have been made, but I think the error, if any, has been obviated by the conclusions reached by me in the findings.

The damages which I have allowed in the report were unliquidated, and consequently I have allowed no interest until judgment is entered upon the report.

The claimant should have judgment as directed in the report.

TAGGARTS PAPER COMPANY v. STATE OF NEW YORK

No. 10335

(Dated December 18, 1917)

Market value of lands appropriated by the State and consequential damages to lands of the claimant not taken arising from such appropriation.

The State of New York, through the Forest Preserve Board, on the 9th of January, 1909, appropriated 11,897 acres of land in Herkimer county in the Adirondack region, said land belonging at that time to the claimant herein. Of the lands taken 7,118 acres contained a virgin stand of hardwood and softwood timber. The balance of the land taken was made up of lakes, burned land and land which had been lumbered in whole or in part and contained 4,779 acres. Within the limit established by law the claimant reserved for its own use and removed all the spruce timber, on the appropriated land, ten inches and more in diameter.

The only questions involved herein are as to the fair and reasonable market value of said land at the date of the appropriation, excepting the spruce timber reserved by claimant, and the consequential damages, if any, caused to claimant by reason of said appropriation. A stipulation had been entered into before the trial by the State and the claimant as to the amount of hard and softwood on the land in question. The stipulation also included the method whereby the value of the hardwood thereon should be estimated and the cost of removing the softwood therefrom. Several weeks before the appropriation, claimant had given to one Gaffney an option to purchase this whole tract and some 5,700 acres lying adjacent to it in Lewis county, including with the land only the hardwood, for the sum of \$70,000. Based upon the stipulation and the other facts above outlined, the court held that, in arriving at the question of the value of the land appropriated, it would take into consideration, *first*, land with merchantable hardwood timber; *second*, the balance of the appropriated parcel without such timber; *third*, the value of the pulpwood; *fourth*, the value of the softwood timber; *fifth*, the value of the hemlock bark. These values were found to aggregate \$175,743.27, as being the amount which a willing buyer and a willing seller would have agreed to as the sum to be paid for the appropriated lands as taken by the State. The claimant had, after the taking of this land, the 5,700 acres in Lewis county, of which 3,700 acres contained a stand of 7,500,000 board feet of merchantable hardwood timber and about 4,000 cords of pulpwood. The appropriation of the adjacent land by the State cut off a right of way to Fulton Chain which depreciated the Lewis county land, the value of the hardwood acreage being fixed

[Vol. 14]

Court of Claims

at \$4 per acre, amounting to the sum of \$14,800. *Held*, that the claimant is entitled to an award of \$175,743.27 for the lands appropriated and \$14,800 for consequential damages for the lands not taken, but is not entitled to damages growing out of the Gaffney option, as Gaffney is without redress even if he has suffered any damages. An award was made.

CLAIM against the State of New York arising from the appropriation of 11,897 acres of land in the Adirondack region, Herkimer county, owned by claimant.

Moot, Sprague, Brownell & Marcy, for claimant.

Merton E. Lewis, Attorney-General (A. F. Jenks, Deputy Attorney-General), and Benjamin McClung, for State.

ACKERSON, P. J.— On the 9th day of January, 1909, the State of New York, through the Forest Preserve Board, appropriated 11,897 acres of land in the Adirondack region and lying in Herkimer county. Said land at the date of the appropriation was owned by this claimant. Seven thousand one hundred and eighteen acres of it contained a virgin stand of hardwood and softwood timber. The balance of 4,779 acres was made up of lakes, burned land and land which had been lumbered in whole or in part. Within six months after such appropriation claimant, as it had a right to do under the law, reserved for its own use all the spruce timber on the appropriated land ten inches and more in diameter. It thereafter removed all of such timber.

There are two questions before this court to be determined in this case, as follows:

A. What was the fair and reasonable market value of said land, at the date of the appropriation, excepting the spruce timber reserved by the claimant?

B. What were the consequential damages, if any, caused to claimant by reason of said appropriation?

The court, in its consideration of this case, was confronted at the very outset with three rather unusual facts or conditions. They are as follows:

First. The parties prior to the trial of the case had entered into a stipulation fixing the amount of hard and soft wood on the land in question. They stipulated between themselves that the statement of the amount of hard and soft wood which they agreed was to be found on said premises, "Shall be received in evidence without further proof as establishing the quantities of hard and soft wood for the purposes of this action."

Second. They further stipulated that certain experts representing both parties should examine this tract of land and report as to the value of the hardwood thereon and the cost of removing the softwood therefrom; and that such report should be received in evidence on the trial of this case. It was agreed, however, that if either of the parties were not satisfied with this report as to value they might submit further evidence thereon.

Third. Less than one month before this appropriation was made the claimant had given an option to one Robert J. Gaffney to purchase this whole tract and about 5,700 acres lying adjacent to it in Lewis county, including with the land the hardwood only, for the sum of \$70,000. And out of this transaction arose several propositions which claimant advanced on the trial of this case as bearing on the damage it has suffered by reason of this appropriation.

The court, after carefully considering the evidence in the case, reached the conclusion that the following items only should be considered in arriving at the question of the value of the land appropriated, to wit:

1. Land with merchantable hardwood timber.
2. The balance of the appropriated parcel without merchantable hardwood timber.
3. The value of the pulpwood.
4. The value of the softwood timber.
5. The value of the hemlock bark.

It will be observed that the parties had already relieved the court from determining, from the testimony of witnesses, the amount of pulpwood on the property by agreeing that there was 22,184.27 cords. In like manner they had relieved the court from

determining the amount of hardwood and softwood timber on the tract with the exception of a quantity of hardwood timber on the south part of the tract which had been overlooked by mistake and which we find contained 3,500,000 board feet. These were conditions not to be found in the ordinary sale of such lands where no guaranty is made of the amount of timber.

The State on the trial sought to be relieved from this stipulation fixing the quantity of wood on this tract, but in the absence of fraud or mistake the court could not grant its application to be relieved from a stipulation it had entered into after such deliberation and after such a careful examination as the evidence disclosed it had made of this property, and after the parties had acted upon it and proceeded to trial. What effect it might have had on the award in this case if this stipulation as to quantities had not been in the case of course the court is unable to determine. But being in the case the court must be governed by it and make its award accordingly.

The proportion which each one of the above items should bear to the others in making up the sum which the court finally fixes as representing the fair and reasonable market value of this property is not easy to determine. It certainly is not determined in the case of the pulpwood and other timber, for instance, by a mere mathematical calculation based on the selling prices at a certain place at the date of the appropriation less the cost of delivery at that place. For such a method does not take into consideration all the vicissitudes which must be met every day in a commercial enterprise of that character. Market value represents what a willing buyer would pay for property to a willing seller. It is not ascertained by measuring what profits could be derived from the property based on what the products of the property would sell for less the cost of placing such products on the market, be it stone, gravel or wood or anything else of such a nature that its quantity could be fairly estimated. The courts have condemned that method of determining market value.

In this case we believe the items above mentioned would be considered in making up such value. And we have determined, in view of all the evidence in this case, in view of the testimony con-

cerning sales of Adirondack property, and of all the uncertainties, chances and dangers which always attend large enterprises where markets, transportation, labor, weather, fire, etc., enter into the possibilities that the fair and reasonable market value of this property on the 9th day of January, 1909, was \$175,743.27.

In other words, we are satisfied from all the evidence in this case that on that date the sum of \$175,743.27 is the amount which would have been fixed upon between a willing buyer and a willing seller as the amount to be paid for this property as taken by the State. Also that in reaching the aforesaid amount of \$175,743.27 as the purchase price of this property the parties to such sale would have considered items of value in this property as follows:

7,118 acres of land with hardwood timber thereon, at \$8 per acre.....	\$56,944 00
4,779 acres of lumbered and burned land, and water, at \$2 per acre.....	9,558 00
2,500 cords of hemlock bark, at \$1 per cord.....	2,500 00
22,184.27 cords of pulpwood, at \$4.25 per cord...	94,283 15
4,983,247 B. F. softwood timber, at \$2.50 per thousand feet	*12,458 12
Total	<u>\$175,743 27</u>

What were the consequential damages, if any, caused to claimant by said appropriation?

The claimant had left of his contiguous tract, after the appropriation, 5,700 acres in Lewis county. We find from the evidence that 3,700 acres of this contained a stand of 7,500,000 board feet of merchantable hardwood timber and about 4,000 cords of pulpwood. The appropriation to some extent isolated this tract of timber and cut off the chance of obtaining a right of way to Fulton Chain, which undoubtedly depreciated this property to some

*At a rehearing of this claim this item was, on February 6, 1918, increased to \$34,857.82, making the total award \$212,942.97, and interest was awarded on this latter sum from January 1, 1917.

extent, which we have fixed at \$4 per acre for the 3,700 acres which contained the hardwood timber, amounting to the sum of \$14,800.

The claimant further contends, as the assignee of all the rights and interests of Robert J. Gaffney in this property, that it is entitled to further damages. We cannot agree with the learned counsel for the claimant in this contention. We believe that the position of the State on this proposition is absolutely unassailable as a matter of law. At the time of this appropriation, Gaffney had a mere naked option to purchase this property on or before the first day of the following April for the sum of \$70,000. He had not served notice of his acceptance of the offer; he had no interest in the fee of the property; and in a case of eminent domain such as this where the property was taken by the State under a law which provided for compensation to the owner only, he is clearly without redress if he has suffered any damages. *Benedict v. Pincus*, 191 N. Y. 377; *People v. Adirondack R. R. Co.*, 160 id. 225; *Frazee Milling Co. v. State*, 73 Misc. Rep. 529; *Watson v. N. Y. C. & H. R. R. Co.*, 47 N. Y. 157.

The claimant offered proof on the other matter which it claimed should be considered in determining the value of this property and the amount of its consequential damages. It is not necessary to discuss them here as it did not appear to the court that any legal liability existed against the State by reason thereof.

We find that the claimant, therefore, is entitled to an award against the State for the sum of \$175,743.27 for the property actually taken and the sum of \$14,800 for damages to the remainder of its property resulting from said appropriation, amounting in all to the sum of \$190,543.27.*

Fennell and Webb, JJ., concur.

* See footnote on preceding page.

SAMUEL A. DANES and Another v. STATE OF NEW YORK

No. 293-A

(Dated December 19, 1917)

Where the State acquires land along a waterway as owner it becomes an intervening owner between lands not taken and the waterway and owns the riparian rights.

On January 6, 1913, this claim was determined by the Board of Claims, which awarded \$9,050 with interest to that date to the claimants herein because of the appropriation by the State of certain lands owned by claimants adjoining the Mohawk river. The award was made up of \$8,050 for the land actually taken and \$1,000 for the appropriation by the State of lands comprising the bed of the Mohawk river to the thread of center of the stream. On appeal by the State to the Appellate Division and to the Court of Appeals the latter court decided that the title to the bed of the Mohawk river was in the State and not in the upland owner; that the award of \$1,000 should be reversed, with costs, leaving the \$8,050 standing, but sending the claim as to the \$1,000 back to the Court of Claims to determine and award the respondents the damages sustained by them, if any, by reason of the interference with their ordinary riparian rights through such taking. The State claims that claimants have suffered no loss from the taking of any riparian rights. This contention is untenable. The State has become the upland owner of the lands between the remaining lands of the claimants and the present shore line, thus depriving them of their riparian rights. *Held*, that by thus cutting off the riparian rights of the claimants damages amounting to \$350 have been inflicted, for which the claimants should have an award. An award was made.

CLAIM against the State of New York arising from the appropriation by the State of uplands belonging to claimants lying between their remaining lands and the Mohawk river, involving the loss to them of ordinary riparian rights.

DeWitt W. Ostrander, for claimants.

Merton E. Lewis, Attorney-General (Wilbur W. Chambers, Deputy Attorney-General), for State.

FENNELL, J.—This claim was originally heard by the Board of Claims which made an award of \$9,050, with interest, Jan-

[Vol. 14]

Court of Claims

uary 6, 1913. The award was made up of \$8,050 for lands, buildings, etc., and \$1,000 "by reason of the appropriation by the State of the lands comprising the bed of the Mohawk river to the thread of center of the stream * * * being intended to cover all other rights growing out of the ownership of said land in the bed of the Mohawk river, and all riparian rights appurtenant to the premises appropriated." Finding No. 3.

The State appealed to the Appellate Division and then to the Court of Appeals. 219 N. Y. 90.

The Court of Appeals decided that the title to the bed of the Mohawk was in the State and not in the upland owner. Judge Collin's opinion contains the following statement: "From the language of the determination of the Board of Claims, we are uncertain whether or not the Board intended to find a damage to the ordinary riparian rights of the respondents by reason of the taking of the land between their remaining lands and the river. That part of the determination awarding the sum of one thousand dollars, in addition to the eight thousand and fifty dollars, should be reversed, with costs in the Appellate Division and this Court, and the matter remitted to the Court of Claims to determine and award the respondents the damages sustained by them, if any, by reason of the interference with their ordinary riparian rights through such taking."

The question to be determined here would seem to be whether or not the claimants sustained any damage by reason of the interference with the "ordinary riparian rights through such taking," and, if any damage was sustained, to fix the amount. The State contends that the item of \$8,050 in the original award, being for the uplands, included the ordinary riparian rights.

An award for uplands would ordinarily include any damages due to loss of appurtenant water rights, but the language of Judge Rooney, in finding No. 3, above mentioned, seems to lead to a contrary conclusion; "said award of \$1,000 being intended to cover all other rights growing out of the ownership of said land in the bed of the Mohawk river, and all riparian rights appurtenant to the premises appropriated."

Judge Rooney's opinion seems to state a different conclusion, as may be seen from the following excerpt from his opinion: "The Board became convinced upon all the evidence and upon an inspection of the premises, and upon consideration of the fact that claimants owned only a portion of the stream, that the value of the water power that could be generated at that point was not large and that the cost of producing such a power under the existing conditions would be so great as to reduce its value to a minimum. The evidence along these lines appears extensively in the minutes of the trial and need not be here recapitulated. It was our judgment that an award of \$1,000, on this point, as covering the value of the land under water, and any development from the use of the water, would be fair compensation."

There being such a plain conflict we are inclined to give the benefit of the doubt to the claimants and to say that the value of the "ordinary riparian rights" was intended by Judge Rooney to be included in the \$1,000 above mentioned.

It is claimed by the State that the claimants have suffered no loss of any riparian rights. We think this contention untenable. There are ordinary riparian rights on navigable streams where the State owns the fee of the land under water. The case of *Rumsey v. N. Y. & N. E. R. R. Co.*, 136 N. Y. 543, is authority for the statement that there are such rights, although not authority as to the relative rights in this case,—as herein one of the parties is the State. See *Sage v. Mayor*, 154 N. Y. 61, 77, where Judge Vann draws this distinction.

Had this been a claim for damages necessarily incident to, or growing out of, improvements in the river channel itself or structures therein erected by the State, the claimants would be without remedy.

This claim grows out of an actual appropriation of land comprised within monumented lines, one line following the edge of the river and the other line being inland, and being beyond the new high water line created by the raising of a dam down stream. The appropriation actually takes the upland of the claimants commencing at the river bank and extending back beyond the new

flow line of the river. This, in fact, makes the State the upland owner of the lands between the remaining lands of the claimants and the present shore line — a strip varying in width and several hundred feet long.

The most advanced position the State can take is that mentioned in Gerard's "Titles to Real Estate," "the individual right of the riparian owner was considered * * * as subject to the right of the State to abrogate, or destroy, it at pleasure, by a construction, or filling in, beyond his outer line and this, too, without compensation made." P. 853. See, also, *Sage v. Mayor*, *supra*, and *Slingerland v. International Contracting Company*, 169 N. Y. 60, 69, 70.

It would seem, therefore, that when the exercise of the paramount public right, in the improvement of navigation, deprives the individual riparian owner of some of his rights as such owner, his inferior right must give way to the superior public right. In this claim we do not have such a condition. Here we have the public authorities, acting under a specific statute, acquiring upland by appropriation. It is true that this improvement is "of navigation," but the damage herein accrues, not from improving the navigation, but from the actual appropriation of uplands owned by the claimants, the State thereby becoming an intervening owner, and thus depriving them of whatever riparian rights might be left to such lands, in the absence of such appropriation, after the State had made its improvements to the navigation of the stream.

The claimants herein have proved some damage because of the State appropriating and becoming the intervening owner of lands between their remaining lands and the new flow line of the river. These damages are small, because the rights themselves were not of great value. These rights were of some value and they have been damaged. *Slingerland v. International Contracting Company*, *supra*, p. 73.

The claimants have been damaged because of the loss of such ordinary riparian rights in the sum of \$350. An award has been made to them in that amount.

Ackerson, J., concurs.

THE BURT OLNEY CANNING COMPANY v. STATE OF NEW YORK

No. 7326

(Dated December 27, 1917)

Failure to file a claim for damages within one year after a dam was completed, when the damages alleged occurred as the result of such structure being built, constitutes a waiver to existing or future damages from the State.

The claimant was the owner of premises in Oneida, N. Y., and was such owner on December 15, 1901, when such premises were flooded and seriously damaged by water. It is alleged that the flooding was the result of construction by the State of an aqueduct at the village of Durhamville for the purpose of carrying the Erie canal over the Oneida creek at that point. *Held*, that the State, having for more than sixty years before this flood maintained the aqueduct at its then condition, was relieved from any responsibility whatever from resulting floods. The various statutes authorizing permanent appropriation of lands, waters and easements by the State required persons claiming damages thereunder to file a claim within one year after the appropriation. In this case the appropriation was made when the dam was completed and the failure to file claim within a year thereafter was a waiver of claimant's right of damage. Claim dismissed.

CLAIM against the State of New York arising from damages caused by the flooding of claimant's canning factory near Durhamville, N. Y., such flooding being caused by waters from the Erie canal flowing through a culvert in an aqueduct carrying the said canal over Oneida creek.

McMahon & McMahon, for claimant.

Merton E. Lewis, Attorney-General (Archie C. Ryder and Frank K. Cook, Deputy Attorneys-General), for State.

WEBB, J.— This claim filed in December, 1903, was for damages alleged to have been sustained by the flooding of claimant's premises in Oneida, N. Y., on the 15th day of December, 1901, which flooding is alleged to have been caused by the construction of an aqueduct at the village of Durhamville, for the purpose of carrying the Erie canal over Oneida creek at that point. The

[Vol. 14]

Court of Claims

trial was begun in April, 1916, concluded in May, 1917, and submitted in August, 1917.

That the flood occurred as alleged, with large consequent damages to claimant's factory, is uncontradicted. That the flood was in part at least due to the construction of the aqueduct at Durhamville, is fairly established by the evidence. The culvert under the aqueduct had a much smaller water area than either of the two structures existing between it and the claimant's factory nearly three miles up-stream. It appeared, however, that other constructions existed in the bed of the creek at its flood valley, such as embankments, piers and bridges, all of which constructions narrowed the creek and its flood area to some extent and necessarily contributed to set back the flood waters upon the claimant's property; for instance, in less than one-third of a mile down stream from the factory the railroad company had constructed an embankment carrying its main tracks, with two culverts sixty and five-tenths feet in width, with an area of 1,076 square feet to carry the waters of the creek. This embankment was much higher than any flood waters, and extended on both sides of the culvert, and at the time of the flood in question the water on the up-stream (factory) side of the culvert was one and one-half feet higher than on the down-stream side, and a large body of water set back from the embankment, covering the floor of the factory to a depth of more than three feet.

The Durhamville aqueduct, including the culvert and the contiguous embankment, was constructed as a part of the canal system of the State in 1840, and was at the time of the flood of December 15, 1901, precisely in the same condition as when originally built. It further appeared by two of claimant's witnesses, who lived in the immediate vicinity of the aqueduct, that on several occasions since the aqueduct was built the water at that point rose as high as in the December flood. There was no evidence of any previous flooding of claimant's premises, due, possibly, to the fact that it did not obtain title to its premises until May, 1901. But the Durhamville aqueduct and the land between it and the claimant's premises were in the same positions in 1840 as in 1901, and if the aqueduct caused the flood of 1901,

why did not equally high water on many other occasions during the intervening sixty-one years produce a like result? Claimant's proofs showed the top of the aqueduct culvert to be elevation 412.65, and high-water elevation at the date of the flood at the aqueduct to be 417.29, or 4.64 feet above the top of the culvert as to which depth the aqueduct acted as a dam. The floor elevation at claimant's factory was 418.3, twelve inches higher than the high-water mark at the aqueduct on December 15, 1901, so that, theoretically at least, had there been no constructions between the aqueduct and claimant's factory, the high water of December 15, 1901, would have been 1 foot below the floor of claimant's factory. It appeared that both the highway bridge and the railroad embankment had been constructed after the aqueduct and its embankment. When the flood waters from above reached the railroad culvert they overflowed the natural channel of the stream before they could find exit through the railroad culvert, and set back the waters upon the claimant's factory. It was claimed that if the culvert at Durhamville had been of sufficient capacity to carry off all water reaching it, the railroad culvert would have been sufficient to carry all the water reaching it. The claimant has not shown it by a fair preponderance of the evidence, and the expert testimony of the engineers did not materially aid the court upon this point. Two of them attributed the flood at claimant's property to be due to the construction of the Durhamville aqueduct, and two of them testified that the aqueduct had nothing whatever to do with it.

However this may be, in the view I take of the case, it is not necessary for the Court to decide the point on which the experts disagree. In my opinion, the fact that the State for more than sixty years before this flood, had maintained the aqueduct at its then condition, relieved it from any responsibility whatever from resulting floods. Flood waters up to elevation 412.65 found an unobstructed flow through the culvert. As to waters in excess of that elevation, the aqueduct acted as a dam, and in so far as it restrained the water from its free passage it was a dam. The complaint is predicated upon the proposition that the aqueduct "obstructed, dammed and held back" the waters of the creek.

The adjudications of the courts upon the liability of the State for damages caused by the construction of dams have been collected and reviewed by this court in the case of *Smith & Powell Company v. State*, 11 Court of Claims, 87-109. In that case the dam was constructed in 1865, and the damages were sustained in 1890-1892. The various statutes authorizing the permanent appropriation of lands, waters and easements by the State required persons claiming damages therefor to file a claim within one year after the appropriation. The decisions are to the effect that the appropriation was made when the dam was completed and the failure to file claim within a year thereafter was a waiver of the right to claim existing or future damages from the State. *Mark v. State*, 97 N. Y. 572; *Stewart v. State*, 105 id. 254; *Benedict v. State*, 120 id. 228.

In the *Mark* case Judge Miller says, (577): "The effect of the limitation in section 48 that the claim must be presented within one year, evidently was to prevent its presentation after the expiration of the time in which it was to be made, and the State occupies the same position toward the claimants as if they had voluntarily executed a release to the State of all their title to the premises, and of all claim for damages."

The damages are alleged to have been caused by the State's failure to construct an adequate culvert in the Durhamville aqueduct, so that it became a dam in high water. The aqueduct, whether it was a dam or culvert, was built in 1840, and the owner's remedy for resulting damages was controlled by chapter 293 of the Laws of 1830, or by chapter 836 of the Laws of 1866 (amending section 84 of the Revised Statutes), both of which statutes required the owners of the property affected to file their claims for damages within one year from the completion of the dam. If they failed to file their claims within the appointed time, the State became vested with a perfect title free from any claims of the owner or of any subsequent owner.

It is for these reasons that the claim is dismissed.

Ackerson, J., concurs.

DAVID R. JONES v. STATE OF NEW YORK

No. 14694

(Dated January 18, 1918).

Where claimant received more than his highest estimate of the value of lands appropriated by the State he must have known that the extra payment was for damage arising from the flooding of the highway.

In 1912 the State appropriated a certain portion of claimant's farm in the town of Russia, Herkimer county, for the Hinckley reservoir. The claimant put in his demand for damages, alleging damages for the value of the land taken, consequential damages and the flooding of the highway. Subsequently his claim was settled for \$550. The facts show that claimant, during his testimony, stated that this payment was "in full settlement of this claim." Claimant now contends that the damage to his farm by cutting it off by the flooding of the highway was not contemplated in that settlement and judgment. He admitted on examination that he received from the State the \$550 damages and that the land itself, 7.362 acres, had cost him \$34. He must have known, therefore, that he had received \$516 for something besides actual land value, and that there was no appreciable consequential damage to the premises other than the flooding of the highway. *Held*, that the claim should be dismissed on the ground that the former settlement was a bar and also upon the merits, inasmuch as this claimant was not misled and was in fact paid in full by the settlement made and judgment entered and paid in former claim No. 1164-A. Claim dismissed.

CLAIM against the State of New York, arising from the appropriation by the State of a portion of a farm belonging to claimant for consequential damages resulting therefrom and for the flooding of the highway.

Charles B. Hane, for claimant.

Merton E. Lewis, Attorney-General (Edward M. Brown, Deputy Attorney-General), for State.

FENNELL, J.—Claimant was the owner of a farm near Grant in the town of Russia, Herkimer county, from before 1912 and

[Vol. 14]

Court of Claims

down to the time of the damages alleged in this claim. The State appropriated from said farm in 1912, for the Hinckley reservoir, 7.362 acres of land. Claimant presented a claim,—No. 1164-A— for damages for said taking. The claim alleged damages for the value of the land taken, consequential damages and the flooding of the highway. Thereafter claimant, his attorneys and the attorneys for the State agreed upon a settlement of said claim for the sum of \$550. In making the proof upon which said settlement was based, the claimant, testifying under cross-examination by the Deputy Attorney-General, stated that the payment was “in full settlement of this claim.” The judgment was made accordingly and the sum of \$550 was thereafter paid claimant in accordance with said settlement and judgment.

Claimant's contention, in this claim No. 14694, is that the damage to his farm by cutting it off by the flooding of the highway was not contemplated in that settlement and judgment. Certain facts brought out on the cross-examination of the claimant became very material in view of his contention. If the claimant was actually misled and suffered material damages by the cutting off of this highway, for which he had not been paid, owing to a mistake on his part, the court would be inclined to give him such relief as was within the power of the court to grant, but the facts, as drawn out on cross-examination, indicate that the claimant was not only not misled but was not damaged in any amount for which he was not fully paid by the State.

He testifies that he purchased fifteen acres at \$1 an acre and canceled a debt of \$70 as additional consideration; that he bought the remaining sixty-five acres at \$106.50, making the total cost to him of the farm \$191.50; that thereafter he expended about from \$200 to \$300 in building a barn fifteen feet by twenty-five feet on the farm; that the frame of the barn was an old frame that he had on one of his other places. Conceding that he spent \$200 on the barn, his total investment was \$391.50, which, divided by an acreage of about eighty acres, made the cost to him of \$4.89 per acre, including small dwelling house and barn. The State paid him \$550 for land which actually cost him \$34. There-

fore he received \$516 for something besides actual land value. There was no appreciable consequential damage to the premises other than the flooding of the highway.

Using the same method of computation, and using claimant's own figure of value, namely \$3,000, which is undoubtedly more than twice too high, and taking from that the \$350 he claims he spent on the house and barn out of his award leaves the value, according to his own figures, at the time of the original appropriation, \$2,650. This produces an acreage value of \$36.80, which, multiplied by the area appropriated by the State, amounts to \$270.82, for which he received \$550, an excess of \$279.18 over the acreage value based upon the very high figures given by the claimant himself. Therefore he received according to his own figures \$279.18 more than his highest estimate of the value of the land. He must have known, and it has been found herein, as a matter of fact, that he did know that this extra payment was for the damage because of the flooding of the highway. All the evidence given in these two claims and the conduct of the witness on the witness stand in examining with great care each paper handed to him for identification warrants the belief that he is and was at all times herein mentioned a very shrewd, capable business man, and was not in any sense or at any time misled as to just what he was getting and for what he was getting it. I have dismissed this claim on the ground that the former settlement was a bar and also upon the merits, inasmuch as this claimant was not misled and was in fact paid in full by the settlement made and judgment entered and paid in claim No. 1164-A.

Ackerson and Paris, JJ., concur.

PUBLIC SERVICE COMMISSION

FIRST DISTRICT

In the Matter of the Hearing on the Complaint of **BRILL BROS.** against the **NEW YORK EDISON COMPANY** with Respect to Alleged Refusal to Refigure the Bills for Electric Current Supplied to Premises at No. 1619 Broadway, Borough of Manhattan, City of New York, and to Refund the Difference Between the Combination Contract Prices and the Individual Contract Price for the Period from November 7, 1915, to November 10, 1916

Case No. 2227

(Public Service Commission, First District, November 5, 1917)

Effect of new rule of the New York Edison Company discontinuing submetering by consumers to subtenants and requiring all users to have separate meter contracts with the company.

Premises in the borough of Manhattan occupied by Brill Bros., at 1619 Broadway in the city of New York, were sublet in part by that firm to Maurice Daly. Brill Bros. entered into a contract with the New York Edison Company, under which they received the current both for themselves and Daly, separate meters being installed for Brill Bros. and for Daly. By this means Brill Bros. were quoted a lower rate than they would have been granted for their own use. They in turn charged Daly for the current at a higher rate than they themselves paid, although even then the price to Daly was less than he would have paid as an independent consumer. Subsequently the Commission decided against the practice of the New York Edison Company of installing separate meters in apartment houses and loft buildings and in furnishing the owners with the current at wholesale rates, which such owners in turn sold to the tenants at the retail rate. The company thereupon added to its rate schedule of May 1, 1915, a provision against such submetering and for the benefit of customers who had been submetering the company provided that the present meters might be purchased by the consumer, and a general meter be installed at the service for recording the entire supply of the premises, all bills to be rendered upon the reading of this general meter supplied by and belonging to the company. Under this change the company notified Brill Bros. to change their meter and that each tenant would have to buy from the company direct. On December 10, 1915, Daly entered into a contract based upon the new ruling. Thereafter he

was billed directly by the company and Brill Bros. ceased to profit from the sale of current to Daly, and also lost the benefit of the rate which his consumption added to theirs would give them.

In the present proceeding complainants seek a refund of the difference between the price paid for current by Brill Bros. and Daly separately from December, 1915, to the date of the new contract made between Brill Bros. and the company on August 17, 1916, and the price which would have been paid if the master meter contract had been put in operation on January 1, 1916. *Held*, that the examination of the evidence fails to show any false representations by the company as charged and that there is no practice of the company disclosed which requires an order to be made by the Commission. Complaint dismissed.

HERVEY, Commissioner.— The facts in connection with this case previous to the acts complained of were as follows: One of the premises in the borough of Manhattan occupied by Brill Bros. at 1619 Broadway was also occupied as a subtenant by Maurice Daly. Brill Bros. under a contract with the New York Edison Company made on December 17, 1913, were receiving current both for themselves and for Mr. Daly. By the terms of this contract the company installed separate meters for Brill Bros. and for Mr. Daly and itemized the bills under the contract giving the readings and the numbers of the individual meters. The result was that Brill Bros. thereby, through the billing to them of the gross amount of current used, got the benefit of a lower rate than would have accrued for the service on either of the meters. Brill Bros. then billed Mr. Daly for the current at a higher rate than they themselves paid, thereby obtaining a profit, while at the same time the price to Mr. Daly was less than he would have paid as an independent consumer.

On March 9, 1915, the Commission adopted an opinion in the New York Edison rate case (*Stadtlander v. New York Edison Company*, 6 P. S. C. R., 1st Dist., 48) in which it recommended the discontinuance of the practice of the company which then existed of installing separate meters in apartment houses and loft buildings and reading such meters and in furnishing the owners with the current at wholesale rates which such owners in turn sold to the tenants at the retail rate. The Commission said: "Owners and agents of apartment houses and loft buildings secure current

[Vol. 14]

Public Service Commission, First District

at the wholesale rate (5¢) and retail it to their tenants at 10¢ per kw. hour. The electric light companies install separate meters for each tenant and read the meters. All the agent or owner has to do for his five cents per kw. profit or more is to make out and collect the bills. As the arrangement between the landlord and his tenant is a matter which is in the form of a contract (this generally in the lease), I think it is clear that we have no right to interfere. The tenant may pay the landlord anything he wishes, but I think that if the landlord wants to take advantage of the wholesale rate and retail it out to his tenants, he should furnish the meters and read them, as well as collect the bills. In other words, that but one meter should be furnished or read for each wholesale customer of this class."

As a result of this opinion the company on April 15, 1915, filed a supplement to its rate schedule effective May 1, 1915, which provided that no meters would be furnished by the company for sub-metering purposes and that all current supplied was to be registered and charged for according to the master meter or meters supplied and maintained by the company.

At the same time the company sent to its consumers a circular letter which, after announcing a deduction of maximum rates in accordance with the order entered upon the opinion above referred to, contained the following statements:

" * * * A further change to take effect at that time is the discontinuance of all sub-metering. As a matter of convenience, our meter service of the past has included an unlimited supply of meters, through which possibly has grown the practice of sub-metering electric current. During a recent investigation by the Public Service Commission this practice, so far as this Company may have contributed to it through the free supply of sub-meters, has met with severe criticism by the Commission, and its abandonment seems the only proper course to follow.

" Meters.

" Under the new schedules many customers may not desire to continue sub-metering. Where this service is to be continued, how-

ever, the present meters may be purchased by the consumer and a general meter will be installed at the service for recording the entire supply of the premises. All bills will be rendered upon the reading of this general meter supplied by and belonging to this Company.

"We shall be glad to have a representative call at your convenience should you desire any further information on these or any other questions relating to the service of this Company."

The following additional facts appear from the testimony: As a result of the circular and published advertisements of the company (which latter, however, were not produced) Mr. Brill sent for a representative of the company, who called upon him in May, 1915, informed him that the company could no longer permit him to sell electricity; that he had to change his meter and get another and that each tenant would have to buy from the company direct. Mr. Brill states that he did not rely so much upon the circular as upon the agent's statements, so that it is not necessary to comment further upon the disingenuous language the circular contained. No evidence was offered by the complainants as to who the representative was or whether or not he was in fact an authorized representative of the company. The company denies knowledge as to any such interview and has no record of any representative calling on the complainants until December, 1915. A record of all calls, however, is not kept by the company.

No change in the situation of the parties followed the alleged call of the company's representative; no new meter was installed, although Mr. Brill testified that he was informed that one was necessary; the current consumed by the tenant Daly through the meter upon the floor leased by him continued to be billed by the company to the complainants and the tenant continued to pay the complainants therefor until December, 1915. There is not evidence that any representative of the company called on Mr. Daly in May, 1915, or until the following December.

Owing to the fact that there were many thousand consumers who had contracts with the company similar to that of the complainants and that a reasonable time was necessary to effect a change in

[Vol. 14]

Public Service Commission, First District

conditions, the prohibition against submetering contained in the schedule effective May 1, 1915, was suspended from month to month. At the conclusion of the hearing held upon the motion of the Commission as to the schedules of the company (6 P. S. C. 1st Dist. 289) an order was entered on October 15, 1915, directing that on and after January 1, 1916, the company determine the amount of current supplied to each customer by means of a master meter and that the company install not more than one meter to a service under each contract.

Although Mr. Brill testified that a new contract was signed as a result of the alleged representation made in May, 1915, no such contract is produced and the company contends that no new contract with the complainants was in fact entered into as a result of the change. As there was no change in the meters and the only result was to bill Mr. Daly independently after December, 1915, there does not appear to have been need for any new contract with Brill Bros.

On December 10, 1915, Mr. Daly, the tenant of the complainants, entered into a contract with the company under which the company agreed to serve him directly upon the premises leased by him. The company produced a witness, Mr. Kelly, one of the company employees, who testifies with much circumstantial detail that prior to the making of the Daly contract he called upon Mr. Maurice Brill because he had a record of all contracts in his district like that held by the complainants and was clearing them up before January 1, 1916, the date fixed by the Commission when the change was to be effected. At this interview he testifies that he advised Mr. Brill that the latter could continue billing his tenants, provided a master meter was installed and the other meters were purchased and that Mr. Brill did not care "to talk on the contract as suggested to him." Mr. Brill denies that Mr. Kelly called on him in December, 1915, and testifies that he never saw Mr. Kelly.

Immediately after the date when he says he had an interview with Mr. Brill, Mr. Kelly filled out a blank contract for Mr. Daly's signature (which contract in Mr. Kelly's handwriting was put in

evidence) and being unable to see Mr. Daly, he left it at his office or mailed it to him. Mr. Daly himself testifies that a young man either called or left word at this time that "they were going to make a change, he would have to put in a separate meter and deal direct with the company." Upon receipt of the message and proposed contract, Mr. Daly called at the company's office. All the employees of the company who interviewed Mr. Daly upon his visit are produced and have testified in detail as to their conversation with him. It will serve no useful purpose to review this testimony. Their testimony in substance is that they explained to Mr. Daly what his rights were and that thereupon he signed the contract on December tenth. Mr. Daly states that he was told that he could no longer procure current from the complainants and would have to deal direct with the company. Immediately upon the execution of this contract, Mr. Daly was billed directly for current consumed by him and complainants no longer received the profit from the sale of current to Mr. Daly nor the benefit of the rate which his consumption added to theirs would give them.

Thus the matter stood until June, 1916, when Mr. Brill was visited by one Leonhardt whose business is described as "expert electrical auditor" and whose company is the National Inspection and Audit Company. Leonhardt testifies that he was a friend of Mr. Daly and being advised by the latter that there was no combination contract in existence upon complainants' premises called upon Mr. Brill and advised him that money could be saved on his electric light bill and solicited a contract of employment upon a contingent basis to effect the saving. Upon the execution of the contract, he then explained to Mr. Brill his right to sell Mr. Daly under the filed schedules. About this time and probably as a result of Mr. Leonhardt's call, complainants wrote to the company as follows: "From time to time we have various individuals calling upon us offering to save us quite some money in our electric light bills, and they invariably do so. It seems to us that if a stranger is able to come in and make this saving that the Edison Company could do it of their own accord. We have to pay something for the services rendered by this individual. Why cannot

[Vol. 14]

Public Service Commission, First District

the Edison Company give us this saving without going to that expense? We think that this is a matter that ought to be taken up very carefully by your Company and we are awaiting your reply."

It is to be noted that this letter charges no false representations. As a result of this letter various representatives of the company called upon Mr. Maurice Brill and testified that they advised him how there could be a saving and that Mr. Brill replied that he would think the matter over. There is no evidence that at any of these interviews Mr. Brill complained of false representations. On August seventeenth, complainants signed a new wholesale contract with the company, which, however, did not affect the service rendered Mr. Daly until his application for cancellation of his existing contract was made about December, 1916.

The complainants in the proceeding are seeking a refund of the difference between the price paid for current by Brill Bros. and Mr. Daly separately from December, 1915, to the date of the new contract and the price which would have been paid if the master meter contract had been put in operation on January 1, 1916. As has been pointed out on numerous occasions the Commission has not the power which is vested in the Interstate Commerce Commission, to order a refund or reparation because of excessive charges and it necessarily follows that it has no power to award damages for loss of profits resulting from false representations. Such claims must be prosecuted in a court of law. In the present case therefore even if the complainants' contention was found sustained by the evidence, the Commission could not order a refund of the amount paid by the complainants in excess of what they would have paid for the current they themselves consumed had the master meter been installed in 1915. Nor could the Commission award damages for the loss of profits, if any, that complainants sustained in not being permitted to sell current to Mr. Daly from December, 1915, to December, 1916. Complaints of this kind are entertained by the Commission in order that it may determine whether the facts warrant the making of any order regulating the future practices of the company. With that end in view the evidence has been examined.

The company contends that even if false representations were made, which it denies, nevertheless complainants were bound to know the contents of the filed schedules and that no representations by or agreements with the company whatever could affect the respective rights of the parties. In my opinion this contention is unsound. It is of course fundamental that no agreement with the company, nor any representation made by the company or its representatives offering a basis of rate different from some one or other of the bases specified in the schedule filed, would be of any force or effect whatever. When once lawfully published, the schedule so long as it remains uncanceled, is fixed and unalterable either by the company or the consumer and the consumer must be charged with the knowledge of the contents of the filed schedule. *Poor Grain Co. v. Q. B. & O. Ry. Co.*, 12 I. C. C. Rep. 418; *Pennsylvania R. R. v. Titus*, 216 N. Y. 17; *Matter of Discriminations by Electrical Corporations*, 1 P. S. C. 1st Dist. 377; *Pub. Serv. Com. Law*, § 66, subd. 12. If this were not so the door would be opened to discrimination especially under the plea of misrepresentation or mistake by company agents in their dealings with the public.

This, however, is not the situation here. If the misrepresentation alleged were actually made it did not extend the complainants' rights beyond the rates or rights fixed by the filed schedule; on the other hand, it deceived the complainants as to their full rights under the schedules. If the company's accredited employees represented that certain rights did not exist, which were in fact existent, and knew such representations to be false and made them with intent to deceive, then I am of the opinion that the complainants would be entitled to redress in the proper forum provided that before acting upon such representations they took means reasonably to assure themselves that the persons making the statements were in fact accredited employees of the company.

The case does not appear dissimilar in principle to *Southern Cotton Oil Company v. Louisville & Nashville Ry. Co.*, 18 I. C. C. Rep. 180, where a refund was sought of part of a rate actually paid. In that case complainant shipped cotton linters and before tendering the shipment made inquiry of the defendant as to the

[Vol. 14]

Public Service Commission, First District

rate to the destination named. Defendant quoted a rate of seventy-four cents per 100 pounds. This was in fact a combination rate on cotton linters when released to a valuation of two cents a pound. Defendant, however, omitted to advise the complainant that the rate over the designated route was so limited. Complainant thereupon tendered the shipments to the defendant and bills of lading were issued on which the seventy-four cent rate was shown, but they contained no release clause signed by the shipper as required by the published tariffs. As a result charges were collected of the combination rate of eighty-one cents. Reparation was sought and the Commission sustained the claim and said:

"While the Commission has consistently adhered to the doctrine announced in that case and must necessarily insist on the application of the legal rate, even though an erroneous rate has been quoted by the carrier and has entered into a commercial transaction as an essential factor, or has been accepted by the consignor as an inducement for offering his merchandise for carriage, it is clear that the case does not control a state of facts such as is disclosed upon this record. The 74-cent rate, the benefit of which the complainant demands, has been published in due form and was the legal rate on cotton linters when released as heretofore explained. The complainant is not in the position, therefore, of seeking the benefit of a rate that has not been legally established; on the contrary, it demands that the defendant shall not collect and retain more on these shipments than the amount of a lawfully published rate. The sole fact of significance that we find on the record is that the defendant quoted to the complainant a legal rate without advising it of the limitation attached to it, and issued bills of lading showing that rate without taking any steps to secure the indorsement by the complainant on the bills of lading of a released valuation clause.

"While the facts are not altogether analogous the case seems to come fairly within the spirit of an administrative ruling made on November 9, 1909. There the shipper indicated on the bill of lading that he was expecting the benefit of the released-valuation rate, but omitted to indorse across its face the special form of

release required under the tariff rules of the carrier. We held that it was the carrier's duty to secure the shipper's signature to such a release when it had reasonable notice of his desire to take advantage of the lower rate under a released valuation. In this proceeding the record shows that the carrier quoted the released rate and issued bills of lading which showed that rate. It also appears that the bills of lading had been prepared by the complainant and were tendered to the defendant with its shipments. Under such circumstances we think that the defendant not only intended the lower rate to apply, but had reasonable notice that the complainant wished the benefit of that rate. It was therefore the carrier's duty to secure the complainant's indorsement on the bills of a released-valuation clause."

In *Sanger v. Southern Pacific Railway Co.*, 2 L. C. C. Rep. 548, complainant informed the ticket agent of the defendant at San Francisco that he desired to purchase tickets from San Francisco to Ft. Leavenworth, Kan., and to New York city for himself and family respectively. The ticket agent informed him that he could give him transportation to Ogden and sell him tickets for his family to that point and no farther, and that it would make no difference as complainant would receive the through rates to Ft. Leavenworth and New York. Acting on these representations, complainant purchased such tickets, but on arriving at Ogden he found he could not procure the through rates and was obliged to buy other tickets resulting in an excess charge over the through rates from San Francisco to Ft. Leavenworth and New York. Believing the exaction of the excess was unjust and unlawful, complainant sought an order for its return. The company defended on the ground that no representations were made and that it was the duty of the company in selling the tickets for the remainder of the distance from Ogden to make the charge precisely as it did in accordance with the regular rates and that it could not do otherwise without subjecting the company to unlawful discrimination. It offered, however, to do whatever should be found to be just and lawful. The Interstate Commerce Commission held that the defendant had acted in good faith without any intention to defraud

[Vol. 14]

Public Service Commission, First District

complainant and that the latter had misapprehended what was said to him in San Francisco, and then continued: "The case, then, is one in which, through misapprehension of the situation, complainant has been compelled to pay the sum of \$52.30 more than he would have paid for the same service had he been laboring under no mistake. The exaction of this sum has all the effect of a wrong to him, though no wrong was intended and no one is really in fault. We think under such circumstances it would be entirely proper and right for the defendant carriers to restore to complainant what, because of his misapprehension, he has paid to them over and above the regular rate. This course will do no wrong to any one else, will work discrimination against no one, and at the same time will leave with the carriers the customary compensation for the service performed."

I am of the opinion that the complainants have not established the fact that any false representations were made. While there is no doubt that the testimony of Mr. Brill as to an interview with a representative of the company some time in May, 1915, is in perfect good faith and that it is his firm conviction that he had such an interview, later communications between Mr. Brill and the company show no reflections of that interview. Besides Mr. Brill failed to remember the visit to him of Mr. Kelly, a representative of the company in December, 1916. I am inclined to give weight to the testimony of Mr. Kelly that he did pay such a visit, supported as it is by the fact that about that time Mr. Kelly prepared the new contract for Mr. Daly which was a natural sequence of what Mr. Kelly testified had occurred at this interview with Mr. Brill. Besides it was the duty of Mr. Kelly to make such visits. It was his principal occupation, while Mr. Brill, as the head of a great merchandising house, received scores of visitors each day upon a great variety of errands and could not at that time in all likelihood have been especially impressed by the visit of Mr. Kelly or with the object of that visit. That the matter is not clear in Mr. Brill's mind is apparent from his own testimony. Upon being asked as to just when the representative called after the receipt of the circular letter in May, 1915, he replied: "I am sure it was

after I had already sent that letter to Mr. Williams why it was the company was not telling about saving me money." The letter referred to was sent in July, 1916, more than a year after the date of the alleged interview. His testimony that he was told that a new contract and a new meter were necessary even if he did not sell to Mr. Daly also indicates that he cannot have clearly in mind the several interviews had with the company's representatives. There is no apparent reason why such a statement should have been made unless he was at the same time being informed of the steps necessary to continue the sale of current to Mr. Daly. Under the then existing contract of December 17, 1913, the landlord and tenant had separate meters and the only change necessary under the Commission's order was for the company to discontinue the practice of furnishing the landlord with the reading of the tenant's meter and to bill the tenant direct.

My examination of the evidence leads me to the conclusion that as false representations have not been established there is no practice of the company disclosed which required an order to be made by the Commission and accordingly I recommend that the complaint be dismissed.

In the Matter of Filing on Short Notice by ELECTRICAL CORPORATIONS Subject to the Jurisdiction of the Commission of a Special Rider in Order to Comply with the Order of the United States Fuel Administrator of November 13, 1917, Affecting the Generation and Supply of Electricity

Special Electrical Permission No. 105

(Public Service Commission, First District, November 14, 1917.)

Resolution of Commission intended to aid in carrying out an order of the United States Fuel Administrator.

On August 23, 1917, a new officer known as the United States Fuel Administrator was appointed by the President of the United States, in connection with the production and supply of fuel. On November 13, 1917, that officer made an order regulating the use of coal for the purposes of generating electricity for use in operating illuminated advertise-

[Vol. 14]

Public Service Commission, First District

ments, notices and signs. The resolution herein is to enable electrical corporations to put into effect a special rider making all schedules and contracts to comply with the said order of the Fuel Administrator.

BY THE COMMISSION.— WHEREAS, On November 13, 1917, the United States Fuel Administrator acting under authority of an executive order of the President of the United States, dated August 23, 1917, appointing said administrator, and in furtherance of the purpose of said order and of the act of Congress therein referred to and approved August 10, 1917, made an order regulating the use of coal for the purposes of generating electricity for use in operating illuminated advertisements, notices, signs, etc., and

WHEREAS, Sufficient reason appears to the Commission for permitting the putting into effect immediately by the electrical corporations subject to the jurisdiction of this Commission a special rider modifying and amending all rate schedules, contracts, service riders and regulations of such corporations so as to comply with said order,

Now, on motion, duly seconded, it is

Resolved, That permission be, and hereby is, granted to every electrical corporation subject to the jurisdiction of this Commission to put into effect immediately after publication and filing with the Commission a special rider containing in substance the following provision:

"Any and all rate schedules, contracts, service riders and regulations of this company that may be affected by order No. 137 of the United States Fuel Administrator issued under date of November 13, 1917, are hereby modified and amended so as to comply in all respects with such order, to take effect on November 15, 1917, and shall remain in effect until further notice."

Further Resolved, That this permission shall take effect forthwith.

IN the Matter of NEW PASSENGER TARIFFS OF THE LONG ISLAND RAILROAD COMPANY Designated as P. S. C. 1 N. Y. No. 151 and Supplement No. 1 to P. S. C. 1 N. Y. No. 146 Containing Certain Changes in Commutation Fares, Mileage Ticket Rates and One-Way and Round-Trip Fares and Distances between Stations

Case No 2209

(Public Service Commission, First District, November 14, 1917)

Passenger tariffs proposed by the Long Island Railroad Company within New York city points not approved — others to be filed.

The question involved herein is as to whether the Commission should approve or disapprove of proposed new passenger rate advances filed with it. In reaching a determination, it should be kept in mind that a broad, constructive, far-sighted policy is necessary in dealing with applications of public utilities for rate increases designed to effect emergency relief. The advances sought relate only to single trip, ten, twenty and fifty-trip and mileage between points within New York city. The new mileage rate proposed is two and one-quarter cents per mile, a rate advance of 12½ per cent., but excluding one single-trip, the ten, twenty and fifty-trip rates show an advance of 10 per cent on prevailing rates. The advances herein asked for are claimed to be necessary in order to secure increased revenue absolutely essential. The burden of proof is upon the Long Island Railroad Company. Basis of application analyzed. Cost of the service, adequacy of present revenue and therefore of rates, reasonableness of proposed rates and their likelihood to produce an increase in revenue. All these elements are to be considered. *Held*, that with the exception of the sanctioned rates specified by the Long Island Railroad Company the rates asked for are not allowed and the said company is directed to file new rates.

William L. Ransom, J. H. Goetz and E. M. Deegan for the Public Service Commission.

Alfred A. Gardner for the Long Island Railroad.

Lamar Hardy, Samuel J. Rosensohn and Arthur L. Lockhart for the City of New York.

John Adikes for the Queens Chamber of Commerce.

William Rilands for the St. Albans Improvement Association.

John J. Eagan for the Seaside Taxpayers' Association of Rockaway Beach.

J. C. Huber for the Taxpayers' Association of Hamilton on the Bay.

Joseph Brochard for the Nineteenth Assembly District of Brooklyn.

Adam Fisher for the Wyckoff Taxpayers' Association.

Andrew J. Kenney for the Public Improvement and Transportation Committee of the Rockaway Board of Trade.

HERVEY, Commissioner.—This proceeding involves the sanction or disapproval of certain advances in the passenger fares charged by the Long Island Railroad Company between points within the city of New York. When the railroad company filed tariffs containing the proposed increases in rates the Commission suspended the taking effect of these tariffs, and hearings have been held meanwhile as to the propriety of the increases.

THE COMMISSION'S PROVINCE

At the outset it may not be amiss to restate certain fundamentals with respect to the powers and duties of this Commission, and its necessary approach to the determination of any question involving the rates or fares chargeable by a franchise-holding public utility. The statute constitutes this Commission as an expert, *quasi-judicial* tribunal, to which is committed, in rate cases, the analysis and weighing of the submitted evidence and the first-instance application of adjudicated rules of law. The State has made the Commission its instrumentality for the expert determination of questions of fact regarding public service corporations and the judicial disposition of public utility matters according to the facts as found and the legal rules as declared by the Legislature and the courts. While in investigation and supervision of public utilities the Commission is empowered to take

the initiative and to act upon its expert knowledge of transportation needs, in the determination prescribing quantity and quality of service or fixing rates, however, the Commission acts *quasi-judicially*; and although its departmental staffs may aid in the bringing out and analysis of the pertinent facts the final decision must be made upon the evidence as submitted.

When the Commission has under consideration a reduction in rates, upon complaint or upon its own motion, the public utility companies correctly maintain that such a reduction shall be passed upon only in the light of the proof submitted and that it shall not be granted for reasons of public exigency or public policy. *No. Pac. R. Co. v. No. Dakota*, 236 U. S. 585, 595. The complainant or the Commission in a proceeding looking to a reduction in rates has been traditionally required to bear the burden of proof in the case. The same rule is likewise operative and statutorily mandatory when a common carrier seeks authority to advance its rates. The application must stand or fall on the case made out by the carrier for the requested relief. The Commission is bound to hold the company to the same requirements of sound and sufficient proof which would be insisted on by the company were the application one to compel the company to lower its charges.

This of course does not mean that the statute requires the Commission in any rate case to follow a narrow or technical conception of its procedure, powers and duties. The Commission was created to do justice to the public utility corporations and the public alike, and in the long run the best interests of both the corporations and the public require fair treatment of both the public and the corporations. A rate too low is as much an injustice and detriment to the public as a rate too high. But the law does contemplate that when a railroad company seeks to change and increase its charges the company shall justify the advance and sustain it with proof proceeding on a sound, fair basis. Failure to supply the essential elements of proof or endeavor to maintain an unsound, unwarranted basis of apportionment and computation must lead to denial of an application for change in rates, whether the application be for reduction or advance.

The foregoing, of course, does not in any way mean that in the consideration of the record in this case the Commission has failed to take into account the disclosed facts, well within common knowledge, showing the extent to which war-time conditions have caused substantial increases in the cost of labor and of many commodities entering into the maintenance and operation of railroad common carriers and other public service corporations, just as into those of ordinary private enterprises. In calculating fair averages of costs and values over a period of years, the economic changes brought by the world-war have been taken into account, and the Commission has not indulged in the violent assumption that after the war prices and operating costs will of necessity return soon to before-the-war levels. The Commission passes upon rates for the present and the future, and in endeavoring to form a fair estimate of probabilities, even emergency conditions and their probable influence on price levels must be taken into account.

The Commission is keenly conscious of the need for a broad, constructive, far-sighted policy in dealing with these applications of public utilities for rate advances designed to afford emergency relief from emergency conditions. It is in the public interest that these vital public utilities shall be kept in a condition of solvency and efficiency in service throughout the war, and that need must be taken into account in all rate problems. The public utility corporations will, of course, hardly expect to maintain their normal rate of return; they will not ask for aid in shifting to their patrons all the burdens of war costs at a time when all individuals and businesses are having to assume a share of the nation's burden; they will not seek to do violence to long-established rate schedules merely by reason of the increased costs and narrowed margin of return brought by emergency conditions both unusual and temporary. In fixing a rate for the future the Commission is bound to take into account the facts which have been placed in the record, and the rights of the company and the public alike must stand or fall for the time on that basis.

PROPOSED RATE ADVANCES

The classes of passenger rates affected are single trip, round trip, ten, twenty and fifty-trip and mileage. Only rates between points within the city of New York are under consideration here, as railroad rates between points within and points outside the city are under the jurisdiction of the Commission for the Second District. The increase in the mileage rate was announced to apply to all lines within the district, the increase in the ten, twenty and fifty-trip rates to the main line, the Montauk division, the North Side division and the Far Rockaway branch; the increase in the round trip rate to the last mentioned lines and divisions and also to the Rockaway Beach division; and the increase in the single trip rate only to the Rockaway Beach division. No increase was proposed between the three western terminals, namely, the Pennsylvania Station (borough of Manhattan), Long Island City (borough of Queens), and Flatbush avenue (borough of Brooklyn) and Jamaica; none between these terminals and the intermediate stations, and none between these western terminals, Flushing and the intermediate stations.

The new mileage rate of two and one-quarter cents per mile would add one-quarter cent to the existing rate — an advance of $12\frac{1}{2}$ per cent. Such an increase in mileage rates was authorized, so far as concerns transportation not exclusively within the limits of the city of New York, by an order made by the Public Service Commission for the Second District on March 22, 1917, Matter of Long Island Railroad Mileage Rates, P. S. C. 2 N. Y.—, decided March 22, 1917. Simultaneously with the filing of the proposed advanced rates applicable to transportation between points within the first district, the Long Island Railroad Company filed advanced rates for excursion tickets, ten, twenty and fifty-trip tickets, party fares tickets, and special trains, coaches and excursions applicable to transportation between points outside of the city of New York and between points within and points without the city over which the Public Service Commission for the Second District has jurisdiction. The Commission for the Second

[Vol. 14]

Public Service Commission, First District

District did not take any action with respect to the latter advances, but permitted them to go into effect.

The proposed rates for the ten, twenty and fifty-trip tickets show an increase of about 10 per cent over the prevailing rates. On excursion rates the percentage of increase varies, but, for example, in the case of the Rockaway Beach division the average advance is about 25 per cent. There is no discernible uniformity in the proportions of proposed increases to the present rates to which they apply.

The Long Island Railroad Company operates a number of divisions and branches on Long Island which have their western terminals in the boroughs of Brooklyn, Queens and Manhattan. Of 397.62 miles of road operated by the railroad carrier approximately 200 are electrified, within and outside the city of New York, and 96.13 miles lie entirely within the city of New York. Its passenger traffic constitutes the major part of its business. In fact, as was pointed out by the Public Service Commission for the Second District in Matter of Long Island R. R. Mileage Rates (decided March 22, 1917), the proportion of its passenger to its freight business is greater than that of any other steam or electrified railroad operating in or near the city of New York. In 1916 its gross passenger earnings amounted to \$8,541,876 and its freight earnings \$4,397,210, and for the whole period from 1905 to 1916, inclusive, the earnings from passenger traffic appear to have been more than twice the earnings from freight.

BASIS OF PROPOSED CHANGES IN RATES

As will be more fully commented on, the exact reason for and basis of each increase the applying carrier has not undertaken to show, beyond that each is to be regarded as a part of a plan of putting into effect numerous increases for the purpose of providing additional revenues. The assumption is that since all rates, taken together, fail to yield sufficient revenue, any or many, at the carrier's wish and selection, may be advanced to the extent desired by the carrier. It is asserted, however, by the railroad carrier that so far as concerns the fares on the Rockaway Beach division the

rates under the old tariff were, and that the fares under the new tariff still would be, less on a mileage basis than is charged for single and excursion tickets anywhere else on the lines of this company, excepting, of course, the five-cent local fare on the Atlantic division. Nevertheless the record fails to disclose whether the present rates on the Rockaway Beach division were based upon factors which justified such a rate in the first instance or whether the proposed rate would have for its basis the elements properly to be considered in fixing the rate. It is not upon the claim that the present Rockaway Beach division rates are discriminatory that the railroad carrier proposes to increase them as shown in the suspended tariffs, but rather because the rates, as also other rates, are deemed insufficient to yield a proper return.

BURDEN OF PROOF

Under section 29 of the Public Service Commissions Law, pursuant to which the Commission suspended the proposed rates, "the burden of proof to show that the increase in rate or proposed increase in rate is just and reasonable shall be upon the common carrier. * * *"

BASIS OF APPLICATION

The justification for the increase in rates was thus stated at the hearings by the president of the Long Island Railroad Company: "The necessity for the increased revenue was due to the increased cost of operation, the increased cost of living for the railroad." It is true that the Long Island Railroad Company has paid no dividends since 1896, and that since 1906 it has earned an annual surplus only in two years, namely, 1909 and 1916; but it is not claimed by the railroad carrier that the object of the increases is to recoup past deficits. The increases are claimed as necessary because the operating charges have, owing to increases in the cost of labor and materials, so advanced as not to be capable of absorption through any other means than an increase in rates.

The evidence of the increased operating costs produced by the railroad carrier at the first hearing betrayed that the announced

advances were not conceived in a careful analysis of the additional revenue requirements, the prospective revenue returns from both advances in fares and increased revenues, or the method of distributing the fare advances. The first proofs on these points were almost unintelligible and altogether unconvincing.

Supposedly to demonstrate that these increases in cost of operation could not be taken care of by surplus, the railroad carrier submitted in evidence the following figures of net operating results: 1905 (surplus), \$22,529; 1906, \$26,359; 1907, \$858,829; 1908, \$276,088; 1909 (surplus), \$316,780; 1910, \$328,563; 1911, \$457,957; 1912, \$282,692; 1913, \$977,985; 1914, \$494,130; 1915, \$161,150; 1916 (surplus), \$241,732.

These are the results of operation of both passenger and freight services. According to the railroad carrier's accounts the book value of its total property is \$73,958,379. An estimate of value of the property was submitted by it at \$89,775,798. These estimates of valuation, however, include property not used in railroad operation of a likewise estimated value of \$3,095,800, and do not include any proper deduction for depreciation. Neither estimate of valuation has been verified and they cannot be regarded as in any way conclusive. The total securities of the company outstanding on December 31, 1916, amounted to \$82,260,000, of which \$12,000,000 was capital stock and \$70,260,000 bonds and long-term debt.

It is quite apparent that, even if proper adjustments were made in the calculations of property value and of income, the net earnings for a number of years past have been insufficient to yield a fair return upon the property used and useful in the public service, and that the carrier should be permitted to charge such rates as will enable it to earn a fair return, provided such rates are reasonable alike to the public, and to the railroad carrier. The railroad carrier does not even propose to establish rates for all freight and passenger services which will yield a fair return upon its property, but limits the application to specific advances upon particular divisions of passenger service in order to secure additional revenue to offset, with other revenue additions, the increased cost of operation.

QUESTIONS FOR DETERMINATION

Logically, the principal questions in this case for the Commission to determine are, *first*, what is the cost of the passenger service upon which the increases in rates are proposed; *second*, whether the revenues under the present rates and, therefore, the rates themselves, afford adequate compensation to the railroad carrier for its passenger service and should or should not be augmented, and, *third*, whether an increase in rates, in the manner proposed and upon the particular divisions of service, is reasonable, justifiable and likely to produce an increase in revenues.

In the determination of the first question we must consider the cost of service during the period of its rendition, and it is not proper or reasonable to include in the cost of such service a part of the cost of past services which remains uncompensated. In other words, the fact that the railroad carrier's rates in the past have not been high enough does not warrant the inclusion of the deficiency in the cost of present service. Such deficiency can be considered only in connection with the reasonable average return to which the carrier may be entitled upon the property investment. Furthermore, the cost of the passenger service should include the expenses incurred only for that service and not for freight service, and any expenses incurred commonly for both classes should be apportioned so that each will bear its own burden.

In the determination of the second question as to compensation, not only is the actual cost of the passenger service to be allowed for, but due regard is to be had, among other things, to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservation out of income for surplus and contingencies. Pub. Serv. Com. Law, § 49, subd. 1. But the property, the use of which in the public service is to be compensated by rates paid by passengers, is confined to that used in the passenger service, and property devoted to both passenger and freight services should be apportioned so that each kind may be required to yield its own return.

In the determination of the third question it does not suffice that the revenues do not exceed the cost of the passenger service

[Vol. 14]

Public Service Commission, First District

as a whole to the extent of yielding a reasonable return, and that there is, therefore, need for additional revenue or means of revenue. The insufficiency of revenue from the passenger service as a whole does not demonstrate that a particular division of service or a particular class of service should provide the additional revenue, without showing further what is the basis of the rates as a whole or in different divisions or classes of passenger service, and which particular division or class should bear a calculated increase in rates. Rate-making is not an exact science; nor does it afford such latitude that, once having found the necessity for additional revenue, selection and not judgment based on all relevant facts may determine which class of service shall bear the increase. A rate to be reasonable must be so not only to the railroad carrier, but also to the public, and the revenue producing power of the rate is not the sole criterion of its reasonableness.

The Commission has examined the sufficiency of the proofs in this case with reference to the questions herein presented. The essential quality of sufficiency is required by the rule that the burden of proof to justify the proposed increase in rates rests upon the railroad carrier.

[Detailed discussion, calculations, statistics, schedules and tables upon cost of passenger service, revenues under the present rates and upon the question whether an increase in rates in the manner proposed and upon the particular divisions of service is reasonable and justifiable omitted.]

It cannot be gainsaid that where a railroad carrier is not under existing rates earning a sufficient sum to pay operating expenses, provide for surplus and contingencies and give the investors a fair return upon the property, such rates should be fixed as will yield the necessary revenues. But the fixation of rates is not simply a matter of collecting a toll from those who are served and are entitled to be served by the railroad carrier. Where different services are performed which can be classified with relation to distinctions in kind of service, quality of service and amount of service, the rates must be fixed with recognition of those distinguishable features. The appropriate relation between various

classes of service should be ascertained. There may be and often are other considerations which influence the amount of a rate which should be exacted for a particular service, such as density of traffic and competition. Nor should each rate in a scheme of rates be so fixed as to yield separately a fair return upon the property used in the service for which each rate is chargeable. Nevertheless, separate and distinct classes of service must be operated so that the burden of the cost incurred for each class should be reasonably confined to it and not be imposed upon another separate and independent class which already bears its distributive share of the necessary costs.

The record in this proceeding and the presentation of the testimony unfortunately disclose a great deficiency in the railroad carrier's system. The railroad has been in existence for more than half a century and yet there has not been made such a study and analysis of its traffic and finances as would furnish a rationale of the various rates charged by the carrier. Without such a study and analysis the carrier has no reasonable or well-balanced basis for its rate schedule beyond that of a realization that to "keep going" it needs net earnings in a certain amount.

MILEAGE RATES

In respect to the proposed increase in mileage, the Long Island Railroad Company has been authorized by the Public Service Commission for the Second District to increase the rate from two cents to two and one-quarter cents per mile. The railroad carrier has been acting upon the assumption that the order of the Public Service Commission for the Second District was effective in fixing the same mileage rate locally within the city of New York, since a mileage rate is obviously operative throughout all parts of a railroad system. The Commission cannot sustain the suggestion of the carrier that the Public Service Commission for the Second District has exclusive jurisdiction to fix any rate for local railroad transportation between points within the city of New York, including mileage rates, as by the Public Service Commissions Law (§ 5, subd. b) such power and jurisdiction are conferred upon

[Vol. 14]

Public Service Commission, First District

the Public Service Commission for the First District. It is perhaps not desirable that one mileage rate should be fixed for one part of a railroad system and another mileage rate for the other part of the system. But there is no conflict in the statutory grant of powers to the two Commissions.

The Public Service Commission for the Second District has made a finding in favor of allowing an increase in mileage rates, and the proof adduced before that body has been submitted and amplified here. While the testimony in this proceeding does not justify a determination by the Commission that the proposed rate increases are generally warranted by the proofs adduced, the Commission recognizes the force of reasons upon which the Second District Commission approved the increase, and feels that a basis for approval of the mileage increase as to points within the city of New York is disclosed. Uniformity of mileage rates on the company's system will be served and additional revenue no doubt afforded by the authorization of the requested increase in the mileage rate for local transportation within the city of New York. This action of the Commission is not, however, to be deemed retroactive, as the Commission has no power to fix rates retroactively.

It is the conclusion of the Commission that, with the exception of the sanctioned increase in mileage rates, sufficient evidence has not been adduced to sustain the reasonableness of the proposed increases in rates by the Long Island Railroad Company. Accordingly, the railroad carrier will be directed to file new tariffs canceling the proposed increases in rates, excepting the mileage rate. This action is taken without prejudice to any other application or proceeding upon new or additional evidence.

If, as wartime conditions develop and new conditions of transportation take more definite form, the carrier wishes to present its situation anew in the light of a more careful analysis of its problems, no action here taken will stand in the way of that. The present decision is based solely on the present record and the disclosure made as to present conditions.

Straus, Chairman, and Whitney, Commissioner, concur; Hayward and Hodge, Commissioners, not present.

In the Matter of the Complaint of ASSETS AND LIABILITIES ASSOCIATION, INC., against THE NEW YORK STEAM COMPANY

Case No. 2259

(Public Service Commission, First District, November 14, 1917)

Refusal to provide service because of arrearages—final order and determination.

The application herein is for an order directing the New York Steam Company to furnish steam service to the Assets and Liabilities Association, Inc., at premises Nos. 47-51 East Fifty-ninth street, in the borough of Manhattan, city of New York. After a hearing an order was made by the Commission requiring the company to furnish steam service to the complainant as required by it at the premises in question without any condition for the payment by complainant of arrearages of the former owner or occupant of the said premises for steam service rendered prior to May 25, 1917.

A hearing having been held in this proceeding on November 8, 1917, Hon. Charles S. Hervey, Commissioner, presiding; John P. Everett, Esq., appearing for the complainant, Assets and Liabilities Association, Inc.; Frederick R. Fishel, Esq., appearing for the defendant, The New York Steam Company; Jacob H. Goetz, Esq., Assistant Counsel to the Commission, attending; and the Commission being of the opinion after said hearing that the New York Steam Company is obligated to furnish to the said complainant and that the said complainant is entitled to steam service at the premises Nos. 47-51 East Fifty-ninth street, in the borough of Manhattan, without any condition as to the payment of the arrearages for steam furnished to said premises prior to May 25, 1917, upon complying with the provisions of section 12 of the Business Corporations Law, and with such reasonable regulations as the said steam company has prescribed,

BY THE COMMISSION.—It is (1) ordered that the New York Steam Company be and it hereby is directed to furnish steam

STATE DEPT. REPT.—VOL. 14 9

service to the complainant as required by it upon compliance by the said complainant with the provisions of section 12 of the Business Corporations Law, including the payment by it of the charges for steam furnished by the New York Steam Company to the premises Nos. 47-51 East Fifty-ninth street, in the borough of Manhattan, city of New York, on and after May 25, 1917, and with any effective reasonable rules and regulations of the said steam company not inconsistent therewith, without any condition for the payment by the complainant of arrearages of the former owner or occupant of the said premises for steam service rendered prior to May 25, 1917.

(2) Further ordered that the New York Steam Company be and hereby is directed to discontinue any practice or regulation inconsistent with the directions of paragraph (1) of this order.

(3) Further ordered that this order shall take effect forthwith, and that within ten days after service thereof the said New York Steam Company shall notify this Commission in writing whether the terms of this order are accepted and will be obeyed.

The above order was based upon the following opinion by Commissioner Hervey:

HERVEY, Commissioner.— Complaint is made by the Assets and Liabilities Association, Inc., as owners of premises Nos. 47-51 East Fifty-ninth street, in the borough of Manhattan, that the New York Steam Company had refused to furnish steam service and had cut off the steam and hot water supply on these premises because of the nonpayment by the complainant of arrearages for steam furnished to those buildings prior to the purchase of the property by complainant at a foreclosure sale.

It appears that in May, 1915, the Forty-nine East Fifty-ninth street Corporation made a second mortgage to the Assets and Liabilities Association, Inc., to secure the payment of \$20,000 with interest, and that on or about January 20, 1917, proceedings were brought to foreclose the mortgage for default of the mortgagor in the payments provided for under the mortgage. A judgment of foreclosure was entered on April 18, 1917, and a sale was had at

which the Assets and Liabilities Association, Inc., bought in the property and a deed of conveyance was executed by the referee to the Assets and Liabilities Association, Inc., on May 25, 1917. Subsequently, a motion was made to set aside the sale but on August 22, 1917, the motion was denied by the Supreme Court.

The complainant entered into possession of the premises on May 25, 1917, and admits its liability for steam consumption from that date.

The defendant contends, however, that the Assets and Liabilities Association, Inc., was a mortgagee in possession of the premises during and prior to the period of the unpaid steam charges, that is, from February 13, 1917, to May 25, 1917. The steam company failed to substantiate in any way this claim, and it is not necessary to consider, even if the Assets and Liabilities Association, Inc., had been a mortgagee in possession, whether it would have been liable for the payment of the steam service. It does appear that the agents of the former owner of the premises, acting by that owner's direction, collected rents, paid certain operating charges incurred on account of the buildings and remitted the balance to the Assets and Liabilities Association, Inc., but such payments to the complainant were made on account of the mortgage debt and were so applied by the Assets and Liabilities Association, Inc. Subsequently to the taking of possession by the complainant of the premises in question, the agent of the building paid to the steam company a bill which had accrued prior to the date of such taking of possession, but it appears that the payment was made because of a notice of discontinuance of steam service to the buildings if the bill were not paid.

The mere fact that the complainant in this case purchased at a foreclosure sale the premises to which service had been rendered, does not, in my opinion, render the purchaser liable for steam charges to the former owner. I cannot see why a purchaser in foreclosure should become responsible for the debts of the former owner, even to a public utility which rendered service to the premises. If that were good practice, he should be called on to pay the grocer's bills or doctor's bills, if any were outstanding.

[Vol. 14]

Public Service Commission, First District

The only difference in this case, apparently, is that the steam company has a monopoly of the service to the premises which the owner cannot secure without complying with the demand of the steam company.

Under section 12 of the Business Corporations Law a consumer who comes within the provisions of that section is absolutely entitled to service. The pertinent part of that section is as follows:

§ 12. District steam corporations.—Any corporation now or hereafter incorporated for the purpose of supplying steam to consumers from a central station or stations through pipes laid in the public streets, shall be known as a district steam corporation and upon the application in writing of the owner or occupant of any building or premises, within one hundred feet of any street main laid down by any such corporation, and payment by him of all money due from him to it, such corporation shall supply steam as may be required for heating such building or premises, notwithstanding there may be rent or compensation in arrears for steam supplied, or for meter, pipe or fittings furnished to a former occupant thereof, unless such owner or occupant shall have undertaken or agreed with the former occupant to pay or to exonerate him from the payment of such arrears, and shall refuse or neglect to pay the same; and if, for the space of twenty days after such application, and the deposit, if required, of a reasonable sum to cover the cost of connection and two months' steam supply, the corporation shall refuse or neglect to supply steam as required, it shall forfeit to such applicant the sum of ten dollars and the further sum of five dollars for every day thereafter during which such refusal or neglect shall continue; * * *."

A steam corporation, like other public utilities, may prescribe just and proper regulations as a means of securing payment for its service and safety in its supply (*Schmeer v. Gas Light Co.*, 147 N. Y. 529, 536); but, by the express provision of this statute, as well as by the well-established general rule (*Chace v. Citizens' Water Co.*, Pa. P. S. C.—P. U. R. 1916 B, 708) the New York Steam Company may not compel a succeeding owner or tenant to pay the debt of a prior user under penalty of refusing to

supply service. It does not appear that the Assets and Liabilities Association, Inc., in any way undertook or agreed with the former occupant to pay or to exonerate him from the payment of the arrears. The claim for steam consumed by an owner or occupant does not create a lien upon the premises of which successors in ownership or occupancy must take notice.

The statutory provisions as well as the general rule gave the steam company the authority to take all reasonable precautions to safeguard the payment of its bills by the former owner. Under section 12 of the Business Corporations Law, the steam company could have exacted a deposit of a reasonable sum to cover two months' steam supply, and by section 14 had its coercive remedy against the prior consumer.

§ 14. Entry by agent of district steam corporation to cut off steam.— If any person or persons, corporation or association supplied with steam by any such corporation, shall neglect or refuse to pay the rent or remuneration for such steam, or for the meter, device, pipes, fittings or appliances, let by such corporation for supplying steam, or for ascertaining the quantity of steam consumed, or the quantity of water resulting from the condensation of the steam consumed, agreed upon or due for the same, as required by his, their or its contract with such corporation, the latter may thereupon stop and prevent the steam from entering the premises of such person, persons, corporation or association, so neglecting or refusing to pay such rent or remuneration, * * *."

The power to discontinue the furnishing of a service of which a public utility has a monopoly is very drastic, and was conferred upon the companies as a protection against defaulting consumers not only to the public utility but to the other consumers to whom the loss through bad debts might be shifted. In view of the right of a steam company to exact a sufficient deposit to guarantee it against loss through defaulting consumers, and the great inconvenience of being deprived of the service, the power of discontinuing service should be exercised only in clear cases of liability. If the steam company failed to exercise the precautions which it had the power and was its duty to exercise the resulting loss should

not be visited upon a succeeding owner or occupant of the building.

Upon the record before the Commission, the ground for discontinuing the service by the New York Steam Company and refusing to furnish service to the complainant was not valid, and the complainant was and is legally entitled to the service of the steam company upon complying with the regulations of the statute and of the company consonant therewith, without complying with the demand of the steam company to pay the arrearages for steam incurred by the former owner or occupant of the premises in question.

It was testified at the hearing that the steam company has twice discontinued service to the complainant as a penalty for the non-payment of the arrearages of the former owner, and that it assented to restore the service and accept an application for such service from the complainant in this case only because it was informally requested to do so by the Commission's secretary, but that the steam company still asserts its claim for such unpaid charges against this complainant.

I am of the opinion that the steam company is obligated to furnish service to the complainant upon the latter's complying with the provisions of section 12 of the Business Corporations Law, including the payment of the charges for steam furnished to the premises in question from May 25, 1917, and with any effective reasonable rules and regulations of the company not inconsistent therewith, without any condition or reservation as to liability for arrearages of the former owner or occupant for service prior to May 25, 1917, when the complainant became possessed of the premises, and to discontinue any practice of the company such as that involved in this proceeding and recommend that an order be entered accordingly.

In the Matter of the Hearing on the Motion of the Commission as to the Rates, Fares, Charges, Regulations, Practices, Equipment, Appliances and Service of the WESTCOTT EXPRESS COMPANY

Case No. 2238

(Public Service Commission, First District, November 21, 1917)

Rates based on distances — same rate for one or two passengers; additional rates for three or more.

The rates of fare charged for passenger service in the city of New York by the Westcott Express Company having been complained of a hearing was held in regard to the matter of details in the practices and charges of the company in September, 1917, several sessions being had. Upon the testimony adduced the Commission found that the charges of the company for carrying passengers in the city of New York were unjust and unreasonable. New maximum rates of fare were therefore ordered to be introduced by the company.

BY THE COMMISSION.— A hearing having been duly had by and before the Commission in the above-entitled matter on September 14, 17 and 18, 1917, Carter, Ledyard & Milburn, by E. De T. Bechtel of counsel, and T. B. Harrison appearing for the Westcott Express Company; O'Brien, Boardman, Harder & Fox, by Philip Boardman of counsel, appearing for the Pennsylvania Tunnel and Terminal Railroad Company; Burlingham, Montgomery & Beecher, by E. C. Rouse of counsel, appearing for the Pennsylvania Railroad Company; Lamar Hardy, Corporation Counsel, by Terence Farley and Samuel J. Rosensohn, Assistant Corporation Counsel, appearing for the City of New York; Heyn & Covington, by L. G. Heyn of counsel, appearing for Black and White Cab Company; William L. Ransom, counsel, and J. H. Goetz and E. N. Deegan, assistants to the counsel to the Commission, attending; and testimony having been taken and counsel for the Westcott Express Company having informed the Commission that the company will present no further testimony on the question of passenger rates, and is willing that the hearing be regarded as closed on the

question of said rates; and the Commission having determined that the rates, fares or charges demanded, exacted, charged or collected by the Westcott Express Company for the transportation of passengers in the city of New York are unjust and unreasonable, and that the maximum rates, fares or charges for such transportation to be hereafter observed and in force should be as hereinafter prescribed, it is

Ordered by the Public Service Commission for the First District of the State of New York that the maximum rates, fares or charges to be demanded, exacted, charged or collected by the Westcott Express Company for the transportation of passengers in the city of New York, be and the same hereby are fixed by said Commission as follows:

For One or Two Passengers

Thirty cents for the first half mile or any fraction thereof; ten cents for each additional quarter mile; ten cents for each four minutes of waiting time; twenty cents extra for each trunk. No charge for hand baggage.

For Three or More Passengers

Forty cents for the first half mile or any fraction thereof; ten cents for each additional one-sixth mile; ten cents for each four minutes of waiting time; twenty cents for each trunk. No charge for hand baggage.

Further ordered that this order is made without prejudice to the making of any further order or orders as to the other subject-matters of this proceeding.

Further ordered that this order shall take effect immediately.

Further ordered that the Westcott Express Company shall notify the Commission within three days after the service of a certified copy of this order upon it whether the terms of this order are accepted and will be obeyed.

In the Matter of the Application of the DRY DOCK, EAST BROADWAY AND BATTERY RAILROAD COMPANY for the Consent of the Public Service Commission of the First District to Make and Issue its Refunding Mortgage and Deed of Trust to Central Trust Company of New York as Trustee, and to Issue Thereunder About \$560,000 Series B Bonds, and \$2,240,000 Series C Bonds to Refund Certain of its Debts and Obligations

Case No. 1715

(Public Service Commission, First District, November 28, 1917)

Modification and amendment of the order of the Public Service Commission of the First District dated June 10, 1917, as to the form of a proposed mortgage.

On November 10, 1917, the Dry Dock, East Broadway and Battery Railroad Company submitted to the Commission a revised form of its proposed mortgage herein and subsequently submitted to the Commission an application verified November 22, 1917, asking that the order adopted in this matter June 8, 1917, consenting to the execution of a mortgage by the said company and to the issuance of bonds thereunder be modified and amended in the manner herein specifically set forth.

By THE COMMISSION.—The Dry Dock, East Broadway and Battery Railroad Company having submitted November 10, 1917, a revised form of its proposed mortgage herein and having also submitted an application verified November 22, 1917, praying that the order adopted herein June 8, 1917, consenting to the issuance and execution of a mortgage by the said company and to the issuance of bonds thereunder be modified and amended for reasons in said application set forth, and it appearing to the Commission after consideration that the said order should be modified and amended as hereinafter set forth, it is

Ordered that the order of the Public Service Commission for the First District made and filed herein June 8, 1917, be and the same hereby is modified and amended to read as follows:

Section 1. The Dry Dock, East Broadway and Battery Railroad Company applied to this Commission by petition dated and

[Vol. 14]

Public Service Commission, First District

verified July 31, 1913, for the consent of the Commission to the issuance by said company of its refunding mortgage and issue thereunder of certain bonds of series B and series C to refund debts and obligations of the company as therein set forth. An order was entered by the Commission April 20, 1914, confirmed on rehearing December 11, 1914, denying said application. The Appellate Division of the Supreme Court, First Department, in review by writ of certiorari of said orders, confirmed May 7, 1915, the said orders and dismissed said writ without prejudice to the relators or either of them applying to the Commission for a further rehearing herein. Thereafter the company and Ralph J. Jacobs and others, as a committee for the benefit of holders of the 5 per cent certificates of indebtedness of said company, made application to the Commission by petition dated July 15, 1915, for a further hearing, which was granted, and on such rehearing the Commission by its order dated May 11, 1916, as changed May 25, 1916, denied the said application without prejudice to a new application for an issue of bonds not to exceed \$2,030,000 in such series and for such purposes as the applicants may specify and which the mortgage to be then presented for the consent of the Commission shall provide for.

Section 2. The said Dry Dock, East Broadway and Battery Railroad Company thereafter made application herein by petition dated and verified July 31, 1916, praying that its original petition dated July 31, 1913, be amended in accordance with the said decision of the Commission so as to pray for the issue of \$528,500 par value of series B bonds and \$1,501,500 par value of series C bonds to refund the debts and obligations of the company specified in said original petition and for other relief as may be necessary or proper. A hearing was held on said petition on September 20, 1916, before the Commission, Commissioners William Hayward, Henry W. Hodge, Travis H. Whitney and Charles S. Hervey presiding, and the company on April 16, 1917, submitted a form of its said proposed refunding mortgage and on November 10, 1917, submitted a revised form of said mortgage. The Commission having now duly considered the said orders and opinion of the Appel-

late Division of the Supreme Court, First Department, dated May 7, 1915, and all the matters and proofs as to this application before the Commission on the original hearing and on the rehearings and on this hearing, and now stating as a preliminary to the authorization of the issuance of bonds hereby given that such authorization is not based on a valuation by the Commission of the properties of said company or any satisfactory proof to the Commission that the interest charges on said bonds can be earned by the company:

Section 3. As to the application under the provisions of the Railroad Law for the consent of the Commission to the said mortgage, it is ordered that the Public Service Commission for the First District does hereby consent to the issuance and execution by said Dry Dock, East Broadway and Battery Railroad Company of a certain mortgage described as follows:

"A refunding mortgage dated July 1, 1915, to Central Trust Company of New York as trustee to secure the following bonds dated as of July 1, 1915, or as of the date of issue and maturing January 1, 1960, viz.:

"\$1,500,000 face value of gold bonds known as series A bearing interest at 5 per cent per annum, payable semi-annually, and having a prior lien and being preferred both as to principal and interest over the subsequent issues of bonds series B and series C described in said mortgage, redeemable on any January first or July first at 105 per cent of the face value thereof and accrued interest.

"\$528,000 face value of gold bonds known as series B, bearing interest at 4 per cent per annum, payable semi-annually, and having a prior lien and being preferred both as to principal and interest over series C bonds described in said mortgage, redeemable, provided there be no series A bonds then outstanding or that all series A bonds then outstanding be redeemed, at the face value thereof, besides accrued interest on any January first or July first.

"\$1,300,200 face value of gold bonds known as series C, bearing interest from July 1, 1917, until July 1, 1925, at such rate not exceeding 5 per cent per annum as the surplus income of said company after providing for all other income charges shall suffice

[Vol. 14]

Public Service Commission, First District

to pay, such interest to be non-cumulative and on and after January 1, 1926, to bear fixed interest at the rate of 4 per cent per annum, and such additional interest each year, not exceeding 1 per cent, as the surplus income of the said company after providing for all other income charges shall suffice to pay, such additional interest not to be cumulative, redeemable on any first day of January or July at face value with any fixed interest accrued and payable to either with such additional interest, if any, as shall have been declared and become payable, provided there shall be then no series A or series B bonds outstanding or that all series A bonds and series B bonds then outstanding be redeemed.

"The form of said mortgage submitted by said Dry Dock, East Broadway and Battery Railroad Company to the Commission on November 10, 1917, is hereby approved and ordered filed and properly identified by a reference thereon to a resolution under the authority of which this order is issued. Said company, however, shall have no right or authority to issue any bonds, pursuant to the terms of said mortgage, except as may be herein or hereafter authorized by the Commission.

"It is further ordered that a duplicate original of the said mortgage consented to as aforesaid shall upon execution thereof be filed by the said Dry Dock, East Broadway and Battery Railroad Company with the Secretary of this Commission."

Section 4. As to the application under the provisions of the Public Service Commissions Law for the consent of the Commission to the issuance by said company of bonds under said mortgage, namely: \$528,500 of series B bonds, and \$1,501,500 of series C bonds it being now the opinion of the Commission that the money or property to be secured by the issue of said bonds of said company to the amount in the aggregate face value of \$1,828,200, payable at a period of more than twelve months after the date thereof, is necessary to and reasonably required by said company for the discharge or refunding of its obligations and particularly for the purposes hereinafter stated in this order, and that the said purposes are not reasonably charged to operating expenses or to income.

Section 5. It is ordered that the Public Service Commission for the First District does hereby authorize the issue by the said Dry Dock, East Broadway and Battery Railroad Company under and pursuant to the terms of the mortgage hereinbefore described, the issue and execution of which is by this order consented to by the Commission, of \$528,000 series B bonds bearing date as of July 1, 1915, maturing January 1, 1960, redeemable, provided there be no series A bonds then outstanding or that all series A bonds then outstanding be redeemed, at the face value thereof besides accrued interest on any January first or July first and bearing interest from May 1, 1917, at 4 per cent per annum, and of \$1,300,200 series C bonds bearing date as of July 1, 1915, maturing January 1, 1960, bearing interest from July 1, 1917, until July 1, 1925, at such rate not exceeding 5 per cent per annum as the surplus income of said company after providing for all other income charges shall suffice to pay, such interest to be non-cumulative; and on and after January 1, 1926, to bear fixed interest at the rate of 4 per cent per annum and such additional interest each year, not exceeding 1 per cent, as the surplus income of said company after providing for all other income charges, shall suffice to pay, such additional interest not to be cumulative, redeemable on any first day of January or July at face value with any fixed interest accrued and payable together with such additional interest, if any, as shall have been declared and become payable, provided there shall be then no series A or series B bonds outstanding or that any series A bonds or series B bonds then outstanding be redeemed, making in all of series B bonds and series C bonds hereby authorized to be issued at face value \$1,828,200.

Section 6. It is ordered that said issue of bonds is hereby authorized upon the conditions following and not otherwise, to wit:

First. That the consent of the holders of two-thirds of the stock of the Dry Dock, East Broadway and Battery Railroad Company in writing to the execution and delivery of the said mortgage shall be duly given and filed according to law.

Second. That the \$528,000 of series B bonds and \$650,100 of series C bonds hereby authorized shall be issued to Third Ave-

[Vol. 14]

Public Service Commission, First District

nue Railway Company only in settlement and upon surrender and cancellation by it of the following obligations of the Dry Dock, East Broadway and Battery Railroad Company owned by Third Avenue Railway Company, namely: \$480,000 face value of receiver's certificates issued by Frederick W. Whitridge as receiver of the Dry Dock, East Broadway and Battery Railroad Company under orders of the United States Circuit Court for the Southern District of New York dated April 22, 1911, and July 18, 1913, with interest adjusted to May 1, 1917. \$1,822,963.60 face value of principal of certain note of said Dry Dock, East Broadway and Battery Railroad Company dated April 30, 1907, and allowed by the special master at \$1,500,000 with all interest which has accrued and is unpaid or which may accrue thereon. \$112,060.73 face value of claims against said Dry Dock, East Broadway and Battery Railroad Company allowed by the special master of which claims a list is presented and filed with the Commission by counsel for the Dry Dock, East Broadway and Battery Railroad Company by letter dated May 2, 1917, together with all interest which has accrued and is unpaid thereon or which may accrue thereon. \$147,782.43 face value of a claim against said Dry Dock, East Broadway and Battery Railroad Company by New York City Railway Company and Adrian H. Joline and Douglas Robinson, receivers thereof, with all interest which has accrued and is unpaid or which may accrue thereon, and the understanding by said Third Avenue Railway Company that as to four other claims shown by said list against said Dry Dock, East Broadway and Battery Railroad Company amounting in all to \$268.50 the Third Avenue Railway Company will, if such claims or any of them are asserted, pay, acquire or cancel the same.

Third. That \$650,100 of the series C bonds hereby authorized shall be issued only to holders of and in settlement and upon surrender and cancellation by them of the following obligations of the said Dry Dock, East Broadway and Battery Railroad Company, namely: Certificates of indebtedness of the said Dry Dock, East Broadway and Battery Railroad Company (of an issue of \$1,100,000 face value) bearing date as of February 1, 1884,

maturing February 1, 1914, with all interest which has accrued and is unpaid or which may accrue thereon; each holder of any such certificates of indebtedness to receive \$59.10 in face value of said series C bonds for each \$100 face value of said certificates of indebtedness and in the said proportion for multiples thereof.

Fouth. That the said company shall keep separate, true and accurate accounts showing in detail the issuance of the bonds hereby authorized to be issued and the obligations settled, surrendered and canceled by the issue thereof and on or before the tenth day of each month shall make verified reports to the Commission stating the disposition of said bonds during the previous month, the terms and conditions of such disposition and the obligations settled, surrendered and canceled thereby; and said accounts, vouchers and records shall be open to audit and may be audited from time to time by accountants and examiners designated for such purpose by the Commission.

Fifth. That the company shall indorse in red ink on each bond issued pursuant to this order the following statement: The order by the Public Service Commission for the First District authorizing the issuance of this bond expressly stated that such authorization was not based on a valuation by the Commission of the properties of the company or on any satisfactory proof to the Commission that the interest charges on this bond can be earned by the company.

Sixth. That on or before March 1, 1918, said company shall file with the Commission an inventory of its fixed capital as of January 1, 1918, together with the ledger values thereof, classified in accordance with the uniform system of accounts prescribed by the Commission for street and electric railways for transactions subsequent to December 31, 1908.

Seventh. That the authority hereby given to issue such bonds shall apply only to bonds issued by said company on or before June 30, 1918.

Section 7. It is hereby ordered that this order take effect on the 28th day of November, 1917, and, except as provided in the seventh subdivision of section 6 limiting the duration of the

[Vol. 14]

Public Service Commission, First District

authority to issue such bonds herein granted, continue in force until otherwise ordered by the Commission, and that within thirty days after service upon it of a copy of this order said company notify the Commission whether the terms of this order are accepted and will be obeyed.

In the Matter of the Hearing on the Motion of the Commission on the Question whether THE BROOKLYN HEIGHTS RAILROAD COMPANY; THE BROOKLYN, QUEENS COUNTY AND SUBURBAN RAILROAD COMPANY; THE CONEY ISLAND AND GRAVESEND RAILWAY COMPANY; THE CONEY ISLAND AND BROOKLYN RAILROAD COMPANY; THE NASSAU ELECTRIC RAILROAD COMPANY; THE SOUTH BROOKLYN RAILWAY COMPANY and BRIDGE OPERATING COMPANY Should Be Required to Purchase or Provide Additional Surface Cars

Case No. 2097

(Public Service Commission, First District, November 30, 1917)

Application for a rehearing.

On September 14, 1917, the Commission adopted resolutions in the matter of the determination as to whether the Brooklyn Heights Railroad Company and other transportation companies in the First District should be required to purchase or provide certain additional surface cars. The present application was made for a rehearing in the said matter upon allegations of facts claimed to have arisen since the making of the final order herein. The present application is on motion of the several transportation companies interested. *Held*, that the course followed by the companies has been one of persistent and conspicuous resort to the courts to defeat an order of the Commission made after careful consideration of all the evidence, and the outcome has been that the Commission has been sustained in every court before which it has come. Statement as to the various steps tried out in this matter by the corporations. In addition to the present application for rehearing before the Commission the corporations have now also united in a motion before the Appellate Division for leave to be heard in the Court of Appeals upon the question heretofore decided against them by Judge Ordway. If unsuccessful in this they will probably apply to the Court of Appeals itself for such leave. Under these circumstances the companies come back to the Com-

mission and ask it now to modify the order which has been sustained by every court to which it has been submitted. They ask this modification while their appeals are pending and they prosecute their appeals while asking relief from the Commission. Present application for rehearing denied.

WHITNEY, Commissioner.—The companies herein now apply for a rehearing upon allegations of facts claimed to have arisen since the making of the final order herein. Under the law, as indicated in a previous supplemental opinion herein, they are entitled to be heard in support of such allegations. In order that no time may be lost in respect to such proof, the matter was set down for an immediate rehearing. It is to be understood, however, that the order granting a rehearing does not change, modify or suspend in any particular the final order herein, and that all the obligations, responsibilities of the companies and their officers under the law and under the order remain effective. The time between the making of the order (February 8, 1917) and the date, December 1, 1917, by which they are obligated by the order to have 100 cars available for operation has been consumed by the companies in litigation looking towards the defeat of the order, rather than to diligence in compliance with the order, as was to have been expected if the expressions of the officers of the companies had any meaning. When the order was made no unusual conditions prevailed and contracts could have been promptly made for cars. It is entirely pertinent therefor on this rehearing to inquire closely into the diligence, or lack of diligence, pursued by the companies. Without discussing such matters, however, it is sufficient at the present time to review briefly the legal steps that have so far been taken by the companies to obviate compliance with the order.

The course followed by the companies has been one of persistent and conspicuous resort to the courts to defeat an order of the Commission made after careful consideration of all the evidence. The outcome has been that the Commission has been sustained in every court before which it has come. *First*, the companies obtained, without notice to the Commission, writs of certiorari to review the Commission's order of February 8, 1917, which required them

to provide 250 additional cars which the Commission found reasonably necessary for the rendering of adequate and decent service by these street railroad companies of the Brooklyn Rapid Transit System. These writs were obtained in the New York County Supreme Court on June 6, 1917, two days before the expiration of the time within which said writs could have been sued out. The moving papers showed no sufficient grounds for resort to the courts to set aside or delay the order of the Commission, as found by Mr. Justice Ordway in a well-reasoned opinion on August 11, 1917, in the course of which he said (166 N. Y. Supp. 825): "As I observed upon the argument of these motions, it is difficult to discover just what the real controversy is in these cases or what the relators' real grounds of objections are to the order complained of. Although there is some intimation that relators regard the increased number of cars ordered as unnecessary, the papers seem to show the contrary, and so far as I can make out the only points that seem to be really in dispute are *first*, as to the character of the cars, whether they should be trailer cars or motor cars, and *second*, as to the date when the companies should be required to put them into service. As to the first point, the order complained of does not provide how many of the cars shall be trailer cars and how many shall be motor cars. There is nothing in the papers to indicate that the Commission is going to insist upon their being all motor cars, or any of them motor cars. It is true that the plans for the cars must be approved by the Commission, which probably includes the determination of the kind of cars, but until the Commission has rejected plans for trailer cars, it cannot be said that the Commission intends to insist upon all of the cars being motor cars. The Commission expressly disclaims any intention to require all of the cars to be motor cars. So far as this point is concerned, it seems to me that the application for the writs is premature, even if writs should be allowed in such case at all. As to the second point, there is no evidence in these papers to justify the conclusion that the companies cannot obtain the cars ordered and put them into service by the date fixed in the order. It is true that the companies allege that they may find it

impossible to get the cars by that date, on account of the conditions resulting from the war. They wrote to the Commission on June 1, 1917, that 'an effort will be made to ascertain whether cars can be secured to conform to such specifications in a reasonable time at a reasonable price.' It does not appear from the papers whether they have made such effort or, if they have, what was the result. Mere allegations that it may be impossible to obtain the cars by the date fixed by the Commission or within a reasonable time, or at a reasonable price, are insufficient to justify a review of the order by writs of certiorari. There is no allegation in the papers that any such facts were presented to the Commission at the time that the order was made, and for that reason writs seeking to review the order upon that ground would now be improper. Section 22 of the Public Service Commissions Law provides that where facts arise subsequent to the making of an order, which are deemed to entitle the companies to a modification of the order which the Commission has made, the companies have no standing in court until they have exhausted the remedy afforded by the statute, and have given the Commission opportunity to afford suitably the relief desired. As I have said, it does not appear that such facts have yet arisen, but if they do the companies have their remedy under section 22 of the law and are not justified in now asking the court to review on this ground an order of the Commission made when these facts were not before them. * * *

"In my opinion, Public Service Commissions should not be hampered and obstructed in their efforts to secure increased transit facilities for the public of this city by proceedings for a court review of their determinations, except in cases where it clearly appears that it is 'necessary to keep them within the law and protect the constitutional rights of the corporations over which they are given control.' It does not seem to me that that has been shown in these cases."

Defeated thus in the State courts and lacking any real grounds for appeal from Justice Ordway's decision, the companies went into the Federal court and sought to obtain an injunction against the enforcement of the Commission's order. This application was

[Vol. 14]

Public Service Commission, First District

heard before the special Federal court, convening under the statute of 1913 for the first time in the history of this State. United States Circuit Judge Ward and United States District Judges Veeder and Augustus N. Hand, composing the special court, unanimously overruled, on August 23, 1917, all of the grounds upon which the companies sought the intervention of the Federal Court of Equity, and in conclusion said, *per curiam* (Brooklyn Heights R. R. Co. v. Straus, 245 Fed. Rep. 133, 135): "As to the last objection which the complainants make, it may be admitted that an order of the commission made without consideration or without any evidence at all or without a hearing, requiring the company to increase its equipment, might amount to a taking of its property without due process of law. But the parties have submitted to us the record before the commission which resulted in the order complained of. We have examined it, not for the purpose of seeing whether we agree with the conclusion reached, but to determine whether that conclusion was the result of a fair hearing upon proofs with a full opportunity to the companies to offer proofs, and we think it was. If the complainants thought, as they now contend, that other and different evidence should have been considered by the commission, it lay upon them to offer it at the hearing."

The companies then, on September seventh, appealed from Justice Ordway's decision to the Appellate Division for the First Department, which unanimously affirmed without opinion.

The companies next appealed from the decision of the special statutory Federal tribunal to the Supreme Court of the United States, but this appeal has not been prosecuted with diligence, and counsel for the Commission has been obliged to notify the companies that unless counsel for the companies complete and file the record required by law, as should have been done some time since, a motion will be made in behalf of the Commission to dismiss this attempt to obtain further delay. The companies' bill of complaint in the Federal court meanwhile remained dormant without any attempt on the part of the companies to bring the matter on for trial, and in consequence counsel for this Commission has

made a motion to dismiss the bill of complaint and has noticed this motion for argument before the United States District Court on Wednesday next.

In addition to the present application to the Commission for a rehearing, the counsel for the companies has now also made a motion before the Appellate Division for leave to be heard in the Court of Appeals upon the question of law presented by Justice Ordway's decision, and that motion is returnable before the Appellate Division on December seventh. If this application for leave to go before the Court of Appeals is denied by the Appellate Division, this will probably be followed by an application to the Court of Appeals itself for such leave.

It is under circumstances such as above outlined that the companies come back to the Commission and ask it now to modify the order which has been sustained by every court to which it has been submitted. They ask this modification at a time when their several appeals are pending, and they prosecute their appeals while asking for relief from this Commission.

In the Matter of the Complaint of JOHN PURROY MITCHEL, as Mayor, etc., for a Determination that the Operation of the Railroad on Central Park West by the New York Railways Company and the Eighth Avenue Railroad Company Is Dangerous and a Menace to Persons Using Central Park West as a Highway

Case No. 2237

(Public Service Commission, First District, December 3, 1917)

Application of the city of New York for relief in the matter of street surface operation by the New York Railways Company along Central Park West held to be defective.

Under chapter 692 of the Laws of 1917 the city of New York through its board of estimate and apportionment was given power to deal with the dangers of surface railroad operation along Central Park West. The city has failed to comply with the requirements of the statute in question

[Vol. 14]

Public Service Commission, First District

and until such requirements are met the Commission has no power to make the determination herein sought. Under these circumstances the proceeding is dismissed without prejudice to the institution of any new proceeding before this Commission under the Greater New York Charter, section 242-c, as amended by the Laws of 1917.

By THE COMMISSION.—Reluctantly the Commission has reached the conclusion that the proceeding instituted by the city of New York, relative to street surface operation by the New York Railways Company along Central Park West, is jurisdictionally defective for non-compliance with and non-conformance to the provisions of chapter 692 of the Laws of 1917, pursuant to which it purports to have been initiated.

The power of the city of New York, through its board of estimate and apportionment, to deal in the manner here contemplated with the dangers of surface railroad operation along this important thoroughfare, is derived wholly from chapter 692 of the Laws of 1917. That was clearly established when the city of New York undertook to remove these tracks from Central Park West without first obtaining a legislative delegation of "police power" for such a purpose. *People ex rel. City of New York v. New York Railways Company*, 217 N. Y. 310. It is elementary law that a legislative act delegating "police power" to a municipality is to be strictly construed and strictly followed, if a valid jurisdictional basis is to be had for the resultant proceeding.

The city of New York, through its mayor, board of estimate and apportionment, and corporation counsel, has not done that which chapter 692 of the Laws of 1917 says must be done before the Public Service Commission can make the determination which is sought in this proceeding. The jurisdictional basis for a hearing before the Commission is thus set forth, with greater explicitness than clarity, in chapter 692: "Whenever in the judgment of the board of estimate and apportionment the *operation* of the street surface railroad located on Central Park West shall by reason of the *operation* of such railroad on the surface of such street constitute a menace to the life or to the safety of persons or property, the board of estimate and apportionment may authorize

the mayor of the city to file a complaint with the Public Service Commission for the First District, setting forth the *dangerous condition resulting from the operation* of said street surface railroad."

Did the board of estimate and apportionment certify its judgment to be that "the *operation* of the street surface railroad located on Central Park West" was, "by reason of the *operation* of such railroad on the surface of such street" a menace, etc.? It has never done that, but has instead certified its judgment to be that "the operation of the street surface railroad located on Central Park West" constitutes "a menace," etc., "by reason of the *present position of the tracks*." The resolution of the board of estimate and apportionment, which was the first step requisite for setting in motion the procedure and giving the jurisdictional basis authorized by chapter 692, stated the matter as follows: "Whereas, in the judgment of the board of estimate and apportionment, the operation of the street surface railroad located on Central Park West, by reason of the present position of the tracks, constitutes a menace to life and safety of persons and property, Resolved, etc."

The board of estimate and apportionment had no right or power, under chapter 692 or otherwise, to substitute "the *position* of the tracks" for "the operation of the railroad" as the basis for finding surface operation along this thoroughfare to be a menace. The Legislature has not empowered the city to deal with a situation arising merely from "the position of the tracks."

The subsequent steps taken by the city suffer from the same vice. The resolution authorizes the mayor to file a complaint setting forth "the *dangerous condition resulting from the operation of the said street surface railroad*," and likewise the statute provides that the complaint shall set forth "the dangerous condition resulting from the operation of said street surface railroad."

Paragraph VIII of the petition or complaint sets forth the following which is the sole allegation concerning the conditions that are alleged to constitute a menace to life and property: "That for many years past, and at present, great congestion and confusion

of traffic has resulted and now results on Eighth avenue between Fifty-ninth street and One Hundred and Tenth street, from the *position* of the railroad tracks of the said Eighth Avenue Railroad Company and its lessee New York Railways Company, respondents herein, constructed thereon as heretofore alleged, and that this congestion and confusion has resulted in many unnecessary collisions between vehicles and surface cars and in numerous accidents to persons including many fatalities, and the present position of the tracks on Eighth avenue between Fifty-ninth and One Hundred and Tenth street is unsafe and dangerous to public travel."

The authorization of the resolution of the board of estimate and the statute require that the complaint set forth "the dangerous condition resulting from the operation of said street surface railroad." The petition states that confusion of traffic results from the *position* of the railroad tracks and the confusion so caused results in numerous accidents. The Legislature had the sole right to say on what grounds the city might start out to deal with this serious problem, and the fact that the enabling statute is awkwardly and unsuitably phrased does not empower the city to substitute different standards for the legislative requirement.

These defects are serious and substantial, and not minute or technical. They go to the very roots of the questions to be passed upon; they take away the right and power of the Commission to make in this proceeding any determination which could serve as a valid basis for the compulsory steps which the statute contemplates. The time, money and effort of all concerned will be conserved by a frank recognition of the situation now, and a retracing of steps which will mean earlier solution rather than prolonged and unsuccessful litigation. It is undesirable that, through the present disregarding of the obvious jurisdictional basis for any action by the board of estimate and apportionment, the mayor, or this Commission, the removal of tracks from Central Park West should be delayed, involved, and finally defeated, as were the west side track removal proceedings under the Saxe law, concerning which Mr. Justice Gerard, in denying the motion for a peremptory mandamus for track removal, said, as reported in the New York

Law Journal for December 22, 1908: "There is no conflict as to the facts in this case. It seems that the old board of rapid transit commissioners never obeyed the law. They prepared a plan, but this plan did not provide for a subway. In detail the proposed plan of the rapid transit commission provided that south of Sixtieth street there should be a subway, but from Sixtieth street to Spuyten Duyvil the intersecting streets should be carried *over* the tracks on viaducts, except at certain portions, where the tracks of the railroad should be carried on an elevated structure. The fault lies with the old board of rapid transit commissioners and not with the present public service commission or the corporation counsel. The old board of rapid transit commissioners failed to take the first step directed by the Legislature. The proper steps not having been taken, the prerequisites to the issue of a peremptory mandamus are wanting."

The Commission therefore feels that the interests of an early solution of the dangerous conditions along Central Park West will be served by a prompt dismissal of the present proceeding, without prejudice, of course, to a new proceeding properly instituted. In reaching this conclusion, the Commission in no way passes adversely upon any of the issues raised by the statute and the proofs. On the contrary, the evidence adduced before the Commission clearly showed the dangers resultant from the present operation and would fully warrant the finding and determination called for by the statute. The Commission is strongly of the opinion that the present dangers resulting from grade operation along Central Park West should be eliminated at the earliest possible time, and hopes for a solution through a track removal which will make Central Park West available as a great, safe north-and-south thoroughfare, comparable with Fifth avenue on the opposite side of Central Park.

The corporation counsel and the board of estimate and apportionment should be promptly advised of the dismissal of the present proceeding.

In concurrence with the opinion of the Commission the following was adopted:

[Vol. 14]

Public Service Commission, First District

A complaint by the mayor of the city of New York, verified August 20, 1917, having been filed herein under the Greater New York Charter, section 242-c, as added by chapter 692 of the Laws of 1917, praying for a determination that the operation of the street surface railroad located on Central Park West in the city of New York constitutes a menace to life or to the safety of persons or property; and a hearing having been held upon said complaint on September 27 and October 3, 11, 24 and 25, 1917, pursuant to a resolution adopted by the Commission on September 10, 1917, and upon notice served upon the city of New York, the New York Railways Company and the Eighth Avenue Railroad Company; Lamar Hardy, by Samuel J. Rosensohn and Vincent Victory, appearing for the city of New York; James L. Quackenbush, by Arthur G. Peacock and Henry J. Smith, appearing for the New York Railways Company; Thomas F. Brennan, appearing for the Brennan Estate; Edward Hagaman Hall, appearing for the American Scenic and Historic Preservation Society; Samuel Parsons and Joseph Schloss, appearing in person; Louis Steckler, appearing for the Central Park Civic League; Fred Hulberg, appearing for the Harlem Board of Commerce; and William L. Ransom, Counsel, Oliver C. Semple and Godfrey Goldmark, Assistant Counsel, attending for the Commission; and after consideration, the Commission being of opinion that it has no jurisdiction to make the determination prayed for by reason of the non-compliance with and non-conformance to the provisions of chapter 692 of the Laws of 1917, but in no way passing adversely upon any of the issues raised by the statute and the proofs herein,

It is ordered that the above-entitled proceeding be and the same hereby is dismissed, without prejudice to any action or proceeding by the city of New York, or the board of estimate and apportionment thereof, or to the institution of any new proceeding before this Commission, under the Greater New York Charter, section 242-c, as added by chapter 692 of the Laws of 1917.

In the Matter of the Hearing on the Motion of the Commission to Inquire and Determine Whether an Order Should Be Made Directing THE NEW YORK STEAM COMPANY to Furnish Service to Applicants on Water Street, in the Borough of Manhattan, City of New York

Case No. 2256

(Public Service Commission, First District, December 5, 1917)

Basis upon which a steam supplying company will be ordered to furnish steam to an applicant.

The complainants, S. Rossin & Sons, are lessees of premises on Water street in the borough of Manhattan, city of New York, within 100 feet of a main through which the New York Steam Company supplies steam. The company has refused service to complainants on the ground that the main in question is below high-water mark and that the work of installation would cost several hundred dollars in addition to \$200 for the service line. *Held*, that, pursuant to the Business Corporations Law, § 12, upon the applicants complying with certain preliminaries, the steam company be required to furnish steam to the said applicants.

WHITNEY, Commissioner.— This proceeding arises out of two separate complaints made by tenants in different premises on Water street, in the borough of Manhattan, city of New York, that the New York Steam Company refused to install a service connection and to give the complainants steam service. One of the complainants having been satisfied, there remains for consideration only the other complaint which was made by S. Rossin & Sons.

The complainants, tobacco traders, are lessees of a building at No. 173 Water street, in the borough of Manhattan, which is within one hundred feet of a main through which the New York Steam Company distributes steam. This main is sixteen inches in size and is one of three feeder mains leaving the steam company's boiler house located approximately opposite the premises at No. 173 Water street. The depth of the main below the surface of the street at that point is from ten to twelve feet, and the tide water below the street is approximately five to six feet, and in exceptional conditions rises to within eighteen inches of the street surface.

When originally constructed, owing to the impracticability of placing this steam main in a tunnel, it was found necessary to put it in a waterproofed envelope beneath tide level.

The objection of the steam company to furnishing service to the complainants is that the main with which the service installation would be connected is below high-water mark and it would be necessary to break through the waterproofing in order to tap the main. While this main is in fact tapped to give service to premises Nos. 140, 141 and 163 Water street, the engineer of the company testified that the topographical conditions along the street varied. It was testified in the steam company's behalf that for safe operation it would be necessary, in order to take a service line off the main at the point opposite No. 173 Water street, to install a waterproofed manhole at that point in the mains, which would cost several hundred dollars in addition to the estimated cost of \$200 for the service line, or to run a small main extension from the manhole between 163 and 165 Water street to No. 173 Water street at a cost of about \$600 in addition to the cost of the service line into the meter building. The estimates of revenue from the service vary from about \$100 per year if a portion of the building were heated, to about \$400 per year if the entire building were heated.

The Business Corporations Law, by section 12, which contains certain qualifications of the absolute duty of a steam company to serve applicants for service, provides:

"§ 12. *District steam corporations.* Any corporation now or hereafter incorporated for the purpose of supplying steam to consumers from a central station or stations through pipes laid in the public streets, shall be known as a district steam corporation and upon the application in writing of the owner or occupant of any building or premises, within one hundred feet of any street main laid down by any such corporation, and payment by him of all money due from him to it, such corporation shall supply steam as may be required for heating such building or premises, notwithstanding there may be rent or compensation in arrears for steam supplied, or for meter, pipe or fittings furnished to a former occupant thereof, unless such owner or occupant shall have undertaken

or agreed with the former occupant to pay or to exonerate him from the payment of such arrears, and shall refuse or neglect to pay the same; and if, for the space of twenty days after such application, and the deposit, if required, of a reasonable sum to cover the cost of connection and two months' steam supply, the corporation shall refuse or neglect to supply steam as required, it shall forfeit to such applicant the sum of ten dollars and the further sum of five dollars for every day thereafter during which such refusal or neglect shall continue; but no such corporation shall be required to lay a service pipe for the purpose of supplying steam to any applicant where the ground in which such pipe is required to be laid shall be frozen, or otherwise present serious obstacles to laying the same, nor unless the applicant, if required, shall deposit in advance with the corporation a sum of money sufficient to pay for two months' steam supply and the cost of the necessary connections and of the erection of a meter and such other special apparatus as are required for use in connection with such steam supply, nor unless the applicant shall provide the space and right of way necessary for the erection, maintenance and use of such connections and apparatus, and signify his assent in writing to the reasonable regulations of the corporation with reference to the supply of steam to consumers."

The testimony in this case does not prove the existence of a "serious obstacle" to laying the service pipe, simply because it may be necessary to break through the waterproofing in order to tap the main. The steam company has installed service connections between the same main and the premises of other consumers on Water street, and it must be aware that the only way it can give service connecting with the main is by an opening of the waterproofing. The objection of the steam company is virtually to the expense of the work and not to a physical obstacle that cannot be overcome by usual precautions and appliances.

But a steam corporation cannot be required to lay a service pipe for the purpose of supplying steam unless the applicant, if required, shall *deposit* "the cost of the necessary connections and of the erection of a meter and such other special apparatus as

[Vol. 14]

Public Service Commission, First District

are required for use in connection with such steam supply." The steam company may require the payment by the complainants not only of a deposit in advance sufficient to pay for two months' steam supply but also the cost of the necessary connections and of the erection of a meter and the other special apparatus.

A question is raised whether, under the tariff schedule filed by the steam company with the Commission, the steam company is not obligated to defray the entire cost of the installation. The company's tariff (P. S. C. 1 N. Y. No. 3, issued May 1, 1917, and effective June 1, 1917) provides in part as follows:

"How the company's service can be obtained: Any person or corporation whose premises are adjacent to the company's mains, can obtain the service by first signing a service agreement in the regular form used by the company at the time for the particular class of service desired, and if required by the company the applicant for service must also make a cash deposit in advance to secure prompt payment of bills.

"Where it is necessary to install a new service line, in order to reach the premises to be served, the company will make such installation wherever it is practicable to do so at its own expense, provided the applicant will agree to continue the use of the service for a period sufficient to warrant the expenditure involved; and in any event will make such installation upon the applicant's making a satisfactory deposit with the company to cover the cost of the installation."

The reservation that the company would make the installation "wherever it is practicable to do so" at its own expense, is very indefinite. The statute already defines its obligation to furnish service to an applicant within one hundred feet of its main. If intended to minimize the conditions under which the steam company will furnish service, this tariff provision should be amended so as to make its intent definite and clear.

The complainants are not entitled to service without complying with the provision of section 12 of the Business Corporations Law as to the deposit, if required, of two months' supply and the cost of installation. If they are willing and ready to comply with

such provision and they make application accompanied with the deposits which the steam company may lawfully require, the latter should install the necessary service appliances and furnish service to the complainants. I recommend, therefore, that an order be entered in accordance with this opinion.

The order entered in accordance with the recommendation in the above opinion was as follows:

BY THE COMMISSION.—A hearing having been duly had in the above entitled proceeding on October 22 and 23, 1917, before Hon. Oscar S. Straus, Hon. Travis H. Whitney and Hon. Charles S. Hervey, Commissioners; Marco Fleischman, appearing for the complainants S. Rossin & Sons; Henry H. Whitman, appearing for the New York Steam Company; Jacob H. Goetz, assistant counsel, attending for the Commission; and the opinion of the Commission having been filed herein, it is

Ordered that the New York Steam Company shall supply steam as may be required for heating the building at No. 173 Water street, in the borough of Manhattan, city of New York, upon the application in writing of the owner or occupant of said building, in accordance with section 12 of the Business Corporations Law, and, if required by said steam company, upon the deposit by the applicant for such service in advance with said steam company of a sum of money sufficient to pay for two months' steam supply and the cost of the necessary connections and of the erection of a meter and such other special apparatus as are required for use in connection with such steam supply.

Further ordered that the New York Steam Company shall file with the Commission, within ten days after the service upon it of a certified copy of this order, a statement in writing setting forth in detail the cost of the said installation, which the said steam company may require to be deposited as aforesaid.

Further ordered that within five days after the service upon it of a certified copy of this order, the New York Steam Company shall notify the Commission in writing whether the terms thereof are accepted and will be obeyed.

In the Matter of the Hearing on Motion of the Commission Concerning the Regulations, Practices, Service, Track Equipment and Terminal Facilities, etc., of the NEW YORK AND QUEENS COUNTY RAILWAY COMPANY, MANHATTAN AND QUEENS TRACTION CORPORATION and THIRD AVENUE RAILWAY COMPANY

Case No. 2165

(Public Service Commission, First District, December 10, 1917)

Suggestions for improving the service of the New York and Queens County Railway Company and other traction companies on the Bridge plaza in Long Island City and on the Queensboro bridge.

The purpose of this proceeding was to do away with the congestion and delay in the operation of cars by the New York and Queens County Railway Company, the Manhattan and Queens Traction Corporation and the Third Avenue Railway Company on the Bridge plaza in Long Island City and on the Queensboro bridge, with special reference to the rush hours of the morning and evening. This congestion was caused in part by the arrangement of the tracks and their relation to the highway at the plaza and in its vicinity. At the hearing given by the Commission several separate plans for effecting the improvements were submitted, and the matter was adjourned in order to allow the railroad companies interested sufficient time to examine and pass upon the plans submitted, and also to consider the traffic changes which were developing through the operation of new rapid transit lines across the Queensboro bridge into the borough of Queens.

During the adjournment the Queensboro bridge to Astoria has been thrown open for use, resulting in decreasing the number of passengers using certain other lines of the New York and Queens County Railway Company. The chief of the transit bureau has reported to the board that the investigation showed that since these changes the delay in car movements which had existed prior to the opening of the Corona and Astoria branches of the rapid transit lines, has entirely disappeared. Under these circumstances, there being no further reason for keeping the case open, ordered that it be discontinued.

WHITNEY, Commissioner.—This proceeding contemplated improvements to obviate the congestion and delay in the operation of cars by the New York and Queens County Railway Company,

the Manhattan and Queens Traction Corporation and the Third Avenue Railway Company on the Bridge plaza in Long Island City and on the Queensboro bridge, especially during the morning and evening rush hours, which were contributed by the arrangement of tracks and highway at and near the plaza.

At the hearing there was introduced a plan prepared by the consulting engineer to the borough president of Queens by which it was proposed to change the location of certain tracks on Jackson avenue in front of the Bridge plaza and to relocate them on the plaza, and to make changes in the loop tracks on the plaza and bridge approach. The acting chief engineer of the department of plants and structures offered a separate plan showing the construction of the loop turning out from the main line tracks on the plaza and running along North Jane street to Ely avenue, thence under the bridge structure and returning to South Jane street and joining the main line eastbound tracks at a point east of the stairways leading to the elevated station. Adjournment of the hearing was taken in order to afford the railroad companies an opportunity to study the plans and also the traffic changes which were developing under the operation of new rapid transit lines across the Queensboro bridge into the borough of Queens.

Since the proceeding was commenced the rapid transit railroad extension across the Queensboro bridge to Astoria has been opened, producing progressive changes in travel and traffic and a very substantial diminution in the number of passengers using, for example, the Dutch Kills and Steinway lines of the New York and Queens County Railway Company, and the operation of the Corona rapid transit railroad extension appears to have a similar effect on the Corona line. The chief of the transit bureau has since reported that an inspection made of the service across Queensboro bridge during the rush hours on October 9, 1917, showed that the slow movement of cars, which had existed prior to the opening of the Corona and Astoria branches of the rapid transit lines, has entirely disappeared. Therefore, there would seem to be no further reason for keeping this case open, and I recommend that it be discontinued.

[Vol. 14]

Public Service Commission, First District

The order entered in accordance with the recommendation in the above opinion was as follows:

By THE COMMISSION.—Hearings having been duly held herein by and before the Commission on December 14, 1916, and adjourned dates to and including March 1, 1917; James L. Quackenbush, general attorney, appearing by Arthur G. Peacock, for Interborough Rapid Transit Company; Edward A. Maher, Jr., appearing for the Third Avenue Railway Company; Robert S. Sloan, president and attorney, and S. B. Severson, secretary and treasurer and general manager, appearing for the Manhattan and Queens Traction Corporation; W. O. Wood, general manager, appearing for the New York and Queens County Railway Company; A. S. Herz, appearing for the North Shore Civic Club; Walter I. Willis, secretary, and F. R. Howe, appearing for the Chamber of Commerce of the Borough of Queens; Herman Meyse, appearing for Bloomingdale Brothers; Maurice E. Connolly, borough president of the borough of Queens, appearing in person; and Edward J. Crummey, assistant counsel to the Commission, attending; and it now appearing that since the said hearings, operation of rapid transit railroads has been extended across the Queensboro bridge and to Astoria and Corona, in the borough of Queens, resulting in changes in the route of travel of passengers using the surface lines of the New York and Queens County Railway Company and in removing congestion and slow movement of cars across the Queensboro bridge and over the Bridge plaza; it is

Ordered that the above entitled proceeding be and the same hereby is discontinued, without prejudice to any other or further proceeding or order with respect to the subject matter of this proceeding.

In the Matter of the Hearing on the Motion of the Commission Concerning the Regulations, Practices and Service of Certain Street Railroad Corporations with Regard to the OPERATION OF OPEN CARS in the Spring and Fall and in Inclement Weather

Jase No. 2183

(Public Service Commission, First District, December 10, 1917)

Investigation as to whether the use of open street and elevated railroad cars should be allowed in the spring and fall seasons and in inclement weather.

The investigation herein was the result of objections made by passengers using the street surface and elevated railroad lines in the first district to the operation of open cars except in warm, dry weather. A hearing was given by the Commission in reference to the matter, and there speedily developed a difference between the views held by those in attendance. The sanitary superintendent of the New York city department of health stated that the open cars were much more conducive to health than closed cars, and should be used in preference excepting when the weather was too severe. It appeared that open cars are operated generally during the period from Decoration Day to Labor Day, that is, from about May thirtieth to September thirtieth. It also appeared that more than a month is required for completing the changes in equipment of open cars for use each year, and that the return to the closed car basis is begun after Labor Day and completed early in October of each year. Upon all the evidence submitted the Commission decided that it did not appear practicable for the Commission to prescribe hard or fast rules based upon the temperature recorded by the thermometer or upon any particular date to govern the operation of open cars. Proceeding discontinued without prejudice to the right of the Commission to institute any other or further proceeding with respect to the subject matter involved herein.

WHITNEY, Commissioner.—The inquiry in this proceeding related to the operation of open street and elevated railroad cars in the spring and fall seasons and in inclement weather.

Complaints have been made by passengers on the street surface lines and on the elevated railroad lines against the operation of open cars except in warm dry weather. That there is not unanimity of opinion as to the effect of exposure to air currents upon the

[Vol. 14]

Public Service Commission, First District

health and comfort of passengers riding in such cars, is evinced by the statement made at the hearing before the Commission by the sanitary superintendent of the department of health of the city of New York that the open cars are much more conducive to health than the closed cars and should be used at any time possible when the weather is not too severe, that is, commencing about the middle of April; that, ordinarily, the more open cars there are on the roads in the spring months the better the public health will be; that it is well to have the windows open even in the closed cars as much as possible; that the reduction of pneumonia cases was attributable to better ventilation in cars during the rush hours, and that a temperature of about sixty degrees was a fair criterion for determining the advisability of operating open cars.

Evidence was given to the Commission by the representatives of the operating street railroads concerned as to the number of open cars operated by their respective companies, their equipment, the time for their inauguration and service and retirement from service, and other practices in respect to their use. The open cars, which appear to be more popular with the majority of passengers during the summer months than closed cars, are operated generally during the period from Decoration Day to Labor Day, that is, from about May thirtieth to about September thirtieth. The changes and equipment of open cars for operation are commenced toward the latter part of April and finished by Decoration Day and the substitution of closed cars for open cars is commenced immediately after Labor Day and completed in the early part of October. Most of the open cars are either of the cross-bench running-board type or of the convertible type and for operating use necessitate, in the case of many cars of the former type, the transfer of motor equipment of closed cars, and, in the case of the cars of the latter type, changes in sides and windows to provide additional openings. The preparation of a large number of open cars for operation cannot, in view of the shop facilities, storage space and available rolling equipment, be finished so that the open cars may be put out in service at one time, and for like reasons their retirement cannot be made all at once, but these changes must proceed gradually.

Thus, in the case of cars not separately equipped with motors, a car of the closed type must be retired from service before a car of the open type can be made ready for service, and *vice versa*. Most cars of the convertible type become practically open cars as soon as the panels are removed or other necessary changes made, and they cannot be replaced until the sections are restored. The Brooklyn Rapid Transit surface lines have a limited number of fully equipped open cars which are put out into service earlier and later in the year if weather permit, that is, if the thermometer is up to about sixty degrees. It is not necessary here to detail the testimony as to the equipment and operation of cars on the various transit lines and the individual circumstances of the companies which control their practice in equipping and putting into operation open cars and changing the equipment and retiring the open cars from service. With the rolling equipment now possessed by these companies and the shop and storage facilities which they can reasonably be required to provide, it is not feasible for the operating companies to transform their vehicles of transportation as rapidly or as suddenly as the variations in weather. It should not be overlooked that all open cars are provided with curtains which serve as shields against rainstorms. It has not been disclosed that the operation of open cars is advanced before the time necessary for making them ready for operation or is prolonged beyond the time necessary for their retirement. It does not appear practicable for the Commission to prescribe any hard or fast rule, based upon the temperature recorded by the thermometer, or upon any particular date, to govern the operation of open cars.

It may be that isolated instances occur when the dispatching of cars should be so controlled as not to expose passengers to riding on open cars during continuous inclement weather, but such instances should be dealt with by special application rather than by a general rule formulated in advance.

I recommend that this proceeding be discontinued.

The order entered in accordance with the recommendation in the above opinion was as follows:

[Vol. 14]

Public Service Commission, First District

By THE COMMISSION.—A hearing having been duly held herein by and before the Commission on February 28, 1917; H. B. Hoffman, appearing for the Brooklyn Heights Railroad Company, Brooklyn Queens County and Suburban Railroad Company, Coney Island and Brooklyn Railroad Company, Coney Island and Gravesend Railway Company, New York Consolidated Railroad Company, and the Nassau Electric Railroad Company; C. L. Addison, appearing for the Long Island Electric Railway Company, New York and Long Island Traction Company, Ocean Electric Railway Company, and the General Electric Railroad Company; James L. Quackenbush, general counsel, appearing by Arthur G. Peacock, for the Brooklyn and North River Railway Company, Interborough Rapid Transit Company, New York Railways Company, New York and Queens County Railway Company, New York and Long Island Traction Company, Long Island Electric Railway Company, and Pelham Bay and the City Line; Alonzo Blauvelt, acting sanitary superintendent, department of health of the city of New York, appearing for the city of New York; John Beaver, appearing for the Second Avenue Railway Company, as its receiver; J. J. Dempsey, appearing for the New York Consolidated Railway Company; E. A. Maher, Jr., appearing for Belt Line Railway Corporation, Dry Dock, East River and Battery Railroad Company, Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company, New York City Interborough Railway Company, Pelham Park and City Line Railway Company, Southern Boulevard Railway Company, Third Avenue Railway Company, Union Railway Company of New York, Westchester Electric Railroad Company, and the Yonkers Railroad Company; William Seibert, appearing for the Brooklyn Rapid Transit Company and other companies; John L. Johnson, the complainant, appearing in person; and Edward M. Deegan, assistant counsel to the Commission, attending; and testimony having been taken and the hearing closed; and it appearing to the Commission that no order should be made herein at the present time to govern the operation of open cars, and that this proceeding should therefore be discontinued, it is

Ordered that the above entitled proceeding be and the same hereby is discontinued without prejudice to the right of the Commission to institute any other or further proceeding with respect to the subject matter involved herein.

In the Matter of the Application of the BLEECKER STREET AND FULTON FERRY RAILROAD COMPANY for the approval by the Public Service Commission for the First District under section 184 of the Railroad Law of a Declaration of Abandonment of Portions of its Route in the Borough of Manhattan, City of New York

Case No. 2229

(Public Service Commission, First District, December 10, 1917)

Circumstances under which the Bleecker Street and Fulton Ferry Railroad Company should be permitted to abandon certain of its routes in the borough of Manhattan, city of New York.

A declaration of abandonment of portions of its route has been adopted by the Bleecker Street and Fulton Ferry Railroad Company, such routes being in the borough of Manhattan, city of New York. The abandonment, includes the lines along the streets and avenues in said borough specifically set forth in the opinion herein. Each of the franchises involved rests in part upon different bases, and has led to difference in the development of the several routes. The questions here presented are, *first*, whether the declaration of abandonment has been adopted and ratified as provided by statute; *second*, whether the part of the road to be surrendered is no longer necessary for the successful operation of the applicant's road, and *third*, whether the part to be surrendered is no longer necessary for the convenience of the public. Some objection has been made by minority stockholders on the ground that the action of the company is not taken for the benefit of the road. These questions have been raised by objections made by minority stockholders but on the testimony adduced have been overruled and have all been decided in the affirmative.

Held, that it is doubtful whether the Bleecker Street and Fulton Ferry Railroad Company or its lessee could now be compelled by mandamus to operate the franchises in question, the public being properly served by other means; that the facts do not show that the majority of stockholders have been so oppressive to the minority as to justify the Commission in voiding their actions and holding the declaration not to have been adopted within the meaning of the statute. Whatever question there may be as to this point is for a court of equity to determine.

[Vol. 14]

Public Service Commission, First District

Also held, that as to the remaining questions which relate to the abandonment of the Bleecker Street Company road and the convenience of the public, the horse car lines proposed to be abandoned have not been in operation for years and are not now operated at all. It is proposed to remove the rails and improve the street so as to give more convenience to ordinary street traffic. Application granted.

STRAUS, Chairman.— This is a petition by Bleecker Street and Fulton Ferry Railroad Company under section 184 of the Railroad Law asking the Commission to approve a declaration of abandonment adopted by the company and ratified by the stockholders of the portion of its road in, upon, over and along Hudson street from Fourteenth street and Ninth avenue to Abingdon square, crossing Abingdon square to Bleecker street, and on Bleecker street to Broadway, and on MacDougal street from Bleecker street to West Fourth street, and on West Fourth street from Sixth avenue to West Twelfth street, and on West Twelfth street from West Fourth street to Hudson street, all in the borough of Manhattan, city of New York. After published notice the petition herein came on for hearing before the Commission and the following facts appear from the proofs presented:

The Bleecker Street and Fulton Ferry Railroad Company properties are held by New York Railways Company under a ninety-nine year lease made in 1876 to the Twenty-third Street Railroad Company. That company later made a lease for the unexpired term of its charter to the Houston Street, West Street and Pavonia Ferry Railroad Company, one of the corporations which were consolidated to form the Metropolitan Street Railway Company, to which company the New York Railways Company has now succeeded, assuming the obligations of the said leases. The New York Railways Company has since acquired 8,283 shares out of the 9,000 shares of the capital stock of the Bleecker Street and Fulton Ferry Railroad Company and has chosen that company's directors. It also acquired \$507,500 out of \$600,000 outstanding stock of the Twenty-third Street Railroad Company. The declaration of abandonment presented to the Commission herein was adopted by the board of directors of the Bleecker Street and

Fulton Ferry Railroad Company on June 8, 1917. It is stated that the franchise of the company to construct, maintain and operate a street surface railroad in, upon and along said streets was no longer necessary for the successful operation of the railroad and the convenience of the public and declared that the franchise be relinquished and abandoned. The declaration was on July 25, 1917, submitted to the stockholders at a special meeting and was ratified and approved, 8,280 shares out of 9,000 shares being present and 8,173 voting in favor. A stockholder having 107 shares of stock protested and voted against the declaration. The company has tracks electrified which are operated as part of the Fourteenth Street Crosstown Line and other tracks electrified in Canal street which are operated as part of another line. The tracks to be abandoned are horse tracks and have been operated at a loss for years. The one horse car that has been operated on thirty minutes headway was discontinued on July 26, 1917. The entire territory is served by other and more efficient means, namely, surface car operation by other lines of New York Railways Company and also by elevated and subway railroads.

The Commission in acting on this application must upon the proofs presented decide:

(1) Whether the declaration of abandonment has been adopted and ratified as provided by statute.

(2) Whether the part of the road to be surrendered is no longer necessary for the successful operation of the Bleecker Street and Fulton Ferry Railroad Company's road.

(3) Whether the part to be surrendered is no longer necessary for the convenience of the public.

In considering the last two questions the Commission is not controlled by the opinion of the company as evidenced by its declaration and is entitled to consider not only what may be now necessary but what may be reasonably anticipated.

The Commission has listened with interest and has carefully examined the objections made by counsel for the minority stockholder who opposed the ratification of the declaration at the stockholders' meeting. These objections are:

(1) The votes of directors and stockholders taken in compliance with the statute are void because of the existence of a plainly conflicting interest, that is to say, the adoption of the declaration by action of the lessee through its ownership of stock of the Bleecker Street Company is taken not for the benefit of the lessor but to discharge the lessee from the obligation to maintain the properties under the lease.

(2) The part of the route proposed to be abandoned is necessary for the successful operation of the Bleecker Street Company as an independent line, that is to say, if the strip be abandoned and the properties returned to the Bleecker Street Company the properties will be in a dismembered and disconnected condition.

(3) It is and will be necessary for the convenience of the public if properly maintained, equipped and operated and not neglected in the interest of competing lines now owned by its lessee, especially if the New York Railways Company shall be disintegrated and the properties be returned to the Twenty-third Street Railway Company.

It is doubtful whether the Bleecker Street and Fulton Ferry Railroad Company or its lessee could now be compelled by mandamus to operate the franchises in question, the public being properly served already by other means. It was established in *People v. Bleecker Street & Fulton Ferry Railroad Company*, 140 App. Div. 611; 201 N. Y. 594, that such franchises if unused are subject to forfeiture in an action by the Attorney-General. In place of such action the provisions of section 184 of the Railroad Law furnish a means for voluntary abandonment. The fact that after such abandonment the lessee's road may be in disconnected parts and if relinquished by the lessee be in such shape as to be incapable of continuous operation may be given consideration but is not controlling against such abandonment becoming effective in the voluntary proceedings. This is shown by an examination of the history of section 184 of the Railroad Law. This section is an outgrowth of chapter 305 of the Laws of 1885, which became section 103 of the Railroad Law of 1890. It allowed a street surface railroad corporation to contract for the use of routes of

other street surface railroad corporations. In the revision of the Railroad Law by chapter 676 of the Laws of 1892, under section 103, abandonment of a portion of a street surface railroad was in the beginning only allowed where *in consequence of a lease* any portion of the route of either lessor or lessee was deemed by it no longer necessary for successful operation of its road. The evident purpose was to eliminate by a voluntary proceeding in the public interest unnecessary routes of street surface railroads which had passed into one control. The statute assumed its present general form through the enactment of chapter 478 of the Laws of 1900, but the fact that the road to be abandoned is under lease cannot be any reason now for denying the right any more than it was under the earlier statute.

The statutes of the State of New York for many years have allowed, even encouraged, ownership by lessee railroad corporations of stock of lessor railroad corporations, although this Commission is not fully convinced of the wisdom of such a policy. Chapter 254 of the Laws of 1867 provided for acquisition by the lessee of such owner of lessor corporations and control and merger of the lessor corporation into the lessee corporation, and that provision of the statute has persisted until the present time. The fact that the lessee as owner of the stock of the lessor corporation furnishes the directors and the stockholders which approved the declaration of abandonment is entitled to consideration. But it does not appear by the evidence before the Commission in this proceeding that their action has been so plainly unfair and oppressive to the minority stockholder as to justify the Commission in saying that their action is void and that the declaration has not been adopted within the meaning of the statute. The matter in any event, as it has been presented here, would seem to be one for a court of equity and the courts have been open to the minority stockholder ever since the meeting of last July.

The only remaining questions are whether the part of the route to be abandoned is necessary for the successful operation of the Bleecker Street Company's road and for the convenience of the public.

At present it is not necessary. The horse lines proposed to be abandoned have not been in operation for years and are not now operated at all. It is proposed if the route be abandoned that the tracks in the street shall be removed and the street be improved and adapted to a more convenient use for ordinary street traffic.

There is no reasonable prospect that it will in the future be necessary. The entire properties of the Bleecker Street Company are under lease to the Twenty-third Street Railroad Company, and under that lease there is paid in rent 4 per cent interest on \$700,000 of bonds and $1\frac{1}{2}$ per cent on \$900,000 face value of stock. That lease has been transferred to and is now held by New York Railways Company, which has assumed its obligations. The Twenty-third Street and the Fourteenth Street Lines are valuable and prosperous parts of the New York Railways Company's system and other parts of the Bleecker street properties are essential parts of roads now in the New York Railways Company's system. There is no reasonable prospect that the New York Railways Company, or any successor of that company, will relinquish the properties of the Twenty-third Street Railroad Company or that the Twenty-third Street Railroad Company or its successor will relinquish the properties of the Bleecker Street Company. In any event, if that should come about and the public convenience should ever require the operation of a route upon the streets now in question or any portion thereof, there is no doubt but that a new franchise for the purpose can be obtained.

An order will therefore be entered granting the application of the Bleecker Street and Fulton Ferry Railroad Company herein.

The order adopted by the Commission in accordance with the foregoing opinion of Commissioner Straus was as follows:

By THE COMMISSION.— Application having been made to this Commission by Bleecker Street and Fulton Ferry Railroad Company, a street surface railroad corporation, by petition verified July 26, 1917, for the approval by this Commission under section 184 of the Railroad Law of a declaration of abandonment of those

portions of its route of street surface railroad in, upon, along and over Hudson street from Fourteenth street and Ninth avenue to Abingdon square, crossing Abingdon square to Bleecker street, and on Bleecker street to Broadway, and on MacDougal street from Bleecker street to West Fourth street, and on West Fourth street from Sixth avenue to West Twelfth street, and on West Twelfth street from West Fourth street to Hudson street, all in the borough of Manhattan, city and State of New York; and a hearing having been duly had on said application before the Commission on September 10, 1917, Commissioners Travis H. Whitney and Charles S. Hervey presiding, and on other dates to which the said hearing was duly adjourned, James L. Quackenbush, Esq., and Arthur G. Peacock, Esq., of Counsel, appearing for the said Bleecker Street and Fulton Ferry Railroad Company in support of said application, Lamar Hardy, Esq., Corporation Counsel for the city of New York, by Vincent Victory, Esq., Assistant Corporation Counsel, appearing for the city of New York, and William D. Guthrie, Esq., appearing for George F. Morgan, a stockholder, in opposition; and proof of publication of the time, place and purpose of said hearing having been duly filed, and the Commission being satisfied by the proofs made that said portions of its route sought to be abandoned are no longer necessary for the successful operation of said Bleecker Street and Fulton Ferry Railroad Company's road and for the convenience of the public;

Now, therefore, it is

Ordered, That said application for the approval of the declaration of abandonment of those portions of the route of street surface railroad of the Bleecker Street and Fulton Ferry Railroad Company in, upon, along, and over Hudson street from Fourteenth street and Ninth avenue to Abingdon square, crossing Abingdon square to Bleecker street, and on Bleecker street to Broadway, and on MacDougal street from Bleecker street to West Fourth street, and on West Fourth street from Sixth avenue to West Twelfth street, and on West Twelfth street from West Fourth street to Hudson street, all in the borough of Manhattan, city and State of New York, be and the same hereby is granted, and that

[Vol. 14]

Public Service Commission, First District

the approval by the Public Service Commission for the First District of said declaration of abandonment of said portion of said company's route be indorsed by the chairman of the Commission and attested by its secretary upon said declaration of abandonment accompanying the petition herein in the following form and manner, to wit:

"The foregoing declaration of abandonment certified by the Secretary under the seal of the corporation therein named has been submitted to the Public Service Commission for the First District of the State of New York for its approval and is approved by said Commission.

"New York, December , 1917.

"PUBLIC SERVICE COMMISSION FOR THE FIRST DISTRICT,

"by , *Chairman.*

"Attest

, *Secretary."*

"[SEAL]

And it is further ordered that this order shall take effect immediately.

In the Matter of the Complaint of HISHMEH & RASHID against
THE NEW YORK EDISON COMPANY, in Regard to Alleged Over-
charge for Electricity

Case No. 2245

(Public Service Commission, First District, December 10, 1917)

The electrical meter is the accepted standard for determining the current used by consumers and should govern where no proof is presented of defects in the meter.

The New York Edison Company, known also as the Edison Company, furnished electric current to the complainants at premises 84 Washington street, borough of Manhattan, city of New York, from May 10 to June 10, 1917, for which it rendered a bill for forty-three dollars and sixty-five cents. The complainants contend that the bill covers the period named. The bill placed in evidence covers the period from May fourth to June eighteenth. The basis of the complainants' contention is that two

subsequent bills of the company were considerably lower than the bill complained of, although the current used was greater than during the disputed period. The meter on the premises was examined by the company and found to be overloaded, and accordingly a new meter was installed on July 9, 1917. The old meter was overloaded but recorded accurately the current consumed, and its removal was due to the overload and not to a defect in the instrument. No proof was given as to the old meter being defective. *Held*, that the meter is the accepted standard for determining the current used by consumers and no proof having been presented of defects in the meter the complaint has not been sustained. Complaint dismissed.

HERVEY, Commissioner.— This is a hearing instituted on complaint of Hishmeh & Rashid for an alleged overcharge by the New York Edison Company (hereinafter referred to as Edison Company) for electric current supplied them at the premises 84 Washington street, borough of Manhattan, city of New York, during the period from May 10 to June 10, 1917. The bill complained of amounts to \$43.65. While the complaint states that the bill is for the period from May tenth to June tenth, the bill of the Edison Company placed in evidence covers the period from May fourth to June eighteenth. The reasons assigned by the complainants as the basis of their complaint are that the two subsequent bills of the Edison Company for current supplied, one covering the period from June 18 to July 19, 1917, and the other covering the period from July 19 to August 17, 1917, were considerably lower than the bill complained of, despite the fact that a one-horse power exhausting fan, four sixteen-inch and four twelve-inch fans were in use on the premises during the two latter periods, in addition to the equipment in use within the period of the disputed bill. Complainants allege that an employee of the Edison Company upon examining the meter on the premises, during the period embraced in the bill complained of, advised the complainants that the meter was defective and that later a new meter was installed. It appears that the meter upon the premises was changed to the name of the complainants on May 4, 1917, and that for a week thereafter complainants had workmen upon the premises fitting it up for occupancy, during which time four

[Vol. 14]

Public Service Commission, First District

or five fifty-watt lamps (left on the premises by the previous occupant) were in use from 8:30 A. M. to 4:30 P. M. each day. Eight two-hundred-watt lamps, three one-hundred-watt lamps and four or six fifty-watt lamps were installed by the complainants upon the premises and placed in use on May 13, 1917.

The premises are used by the complainants as a restaurant and the lamps are alleged by the complainant to be in full use only from about 12 noon to 1:45 P. M. each day. The use of the lamps thereafter depends upon the number of customers that may frequent the restaurant. The complainants upon receipt of the bill for \$43.65 refused to pay the same and protested to the Edison Company, claiming it was excessive. The meter was examined by the Edison Company and found to be overloaded, not having been installed to record current for the use of high power lamps, and accordingly a new meter was installed on July 9, 1917. The testimony clearly shows that while the old meter was overloaded it accurately recorded the current consumed and that its removal was due to the overload and not a defect therein. No proof was introduced by the complainants that would lead me to believe that the old meter was defective. On the contrary evidence offered by the Edison Company was to the effect that the old meter was tested on two or three occasions before and after its removal from the premises and found to be accurate. The records of the Edison Company, which were inspected by one of the employees of the Commission's Electrical Laboratory, showed that readings of the old meter were made on May 4, May 17 and June 18, 1917; that the amount of current consumed from May fourth to May seventeenth (thirteen days) was 132 kilowatt hours and from May seventeenth to June eighteenth (thirty-two days) was 448 kilowatt hours. This shows a daily average consumption during the period from May fourth to May seventeenth of 10.15 kilowatt hours and a daily average consumption from May seventeenth to June eighteenth of 14 kilowatt hours, which difference in the daily average is not excessive. It was testified that the operation of the fans had little effect on the bills, as the consumption was

small, the total consumption for the entire period of occupancy of the premises by the complainants being only 69 kilowatt hours.

The current consumed during the two subsequent periods for which bills were rendered by the Edison Company and paid by the complainants were as follows: June eighteenth to July nineteenth (thirty-one days) 362 kilowatt hours, and July nineteenth to August seventeenth (twenty-nine days) 290 kilowatt hours. The bill rendered by the Edison Company to the complainants covering the period from August 17 to October 18, 1917 (sixty-one days) shows an average consumption of 335 kilowatt hours per month. The variation in current consumed per month does not appear to be abnormal. Usually, as the summer comes on with the long days and better natural light the consumption of electric current decreases and as the fall comes on with the shorter days the consumption increases. The United States Weather Bureau advised the electrical laboratory of the Commission that during the period from May 4 to June 18, 1917, twenty-six days were overcast or cloudy and on nineteen days it actually rained. Several plausible reasons were assigned by the Edison Company to explain the difference in amount of current consumed during the period embraced in the bill complained of, and subsequent periods, such as duration, the first bill covering forty-five days, while the two subsequent bills upon which complainants place so much reliance were for thirty-one and twenty-nine days respectively; the opening of a new store, which is usually attended with more than the normal use of light, due to the desire on the part of owners to advertise a new business, or to the failure to observe the more careful routine in the use of electricity established afterwards. Mr. Williams of the Edison Company stated it is not an infrequent occurrence in such cases for the first bill for electric current to exceed subsequent bills. It was shown on the hearing that the rate for electric current was reduced by the Edison Company on July 1, 1917, from seven and one-half to seven cents per kilowatt hour and this explains to a certain extent the difference in amount of the first bill over the subsequent bills.

[Vol. 14]

Public Service Commission, First District

There is no doubt in my mind that the complainants are acting in good faith in this matter. The difference in amount between the first and the subsequent bills is substantial, and upon first impression any man would be justified in questioning the correctness of the bills as the complainants did. Yet the evidence shows that the meter in use during the period embraced in the bill complained of was tested by the Edison Company before and after its removal and that it was found accurate. The meter is the accepted standard for determining the current used by consumers. No proof has been presented of defects in the meter. The variations in the current consumed during the various periods embraced in the bills in evidence are not abnormal and under all the facts I am of opinion the complaint has not been sustained. I accordingly recommend that the complaint be dismissed.

The order entered in accordance with the recommendation in the above opinion was as follows:

BY THE COMMISSION.—A hearing having been held in this proceeding on October 31, 1917, Hon. Charles S. Hervey, Commissioner, presiding; K. Rashid appearing for the complainants, Arthur Williams appearing for the New York Edison Company, and Robert J. Farrington, junior assistant counsel, attending for the Commission, and the Commission having filed its opinion herein recommending that the complaint herein be dismissed,

Now therefore, it is

Ordered, that the said complaint be and hereby is dismissed.

**In the Matter of the EFFECT OF PRESIDENTIAL DIRECTION OF
RAILROAD OPERATION AND NATIONAL REHABILITATION OF
RAILROAD FINANCES UPON THE REGULATIVE POWERS OF
STATE COMMISSIONS**

(Public Service Commission, First District, January 30, 1918)

Question as to whether a trackage agreement between the Long Island Railroad Company and certain other railroad corporations should be submitted by the companies concerned for the approval of the Commission under section 54 of the Public Service Commissions Law.

Effect of the proclamation by the President of the United States dated December 26, 1917, taking possession and control of transportation throughout the Continental United States.

Adjustment of terms of compensation to the several carriers in the matter of through operation is a matter of negotiation.

Analysis of the proclamation.

Section 54 of the Public Service Commissions Law of the State of New York forbids the making of any contract as to the lease or use by a railroad of the tracks of another railroad corporation without the approval of the proper commission. As the agreement under consideration relates in part to the exercise of the rights and the use of the tracks of a railroad located wholly within the city of New York, it requires the approval of this Commission unless something has occurred in the National sphere affecting the railroad corporations interested in this proceeding which removes them from the authority of the legislative power of this sovereign state. The constitutional and legal questions presented in this connection considered.

The President in time of war has power to take and utilize such private property as may be necessary for the supply and maintenance of troops in the field or the seasonable movement of the army and navy to such places as he deems necessary to the conduct of the campaigns. War greatly intensifies and broadens his powers and he is the official charged supremely with the faithful execution of the law. The "war power" of the government is plenary and it would be unsafe to attempt to define its metes and bounds. Congress has the power to declare war and therefore has the power to carry it on, but its power cannot interfere with the command of the forces and the conduct of campaigns. The President in time of war through the Secretary of War may take possession and assume control of systems of transportation for any purposes connected with the emergency of war. He may exclude other traffic, passenger or freight, from the railroads or any part of them so far as seems necessary in order to have the functions of war transportation most quickly and adequately fulfilled.

[Vol. 14]

Public Service Commission, First District

Questions of the compensation to be paid to the owners of property taken for war purposes are legislative and judicial, not executive, and are not covered by the President's proclamation. The questions even in war time are to be determined by the ordinary rules of private and public right. The rates to be charged by the companies for privately owned freight carriage remain for legislative and judicial consideration. The agreement in question should be submitted for the approval required by the State laws and hence to the Commission.

Opinion submitted to the Public Service Commission of the First District by WILLIAM L. RANSOM, counsel to the Commission, January 21, 1918. Approved by the Commission January 30, 1918.

I am in receipt of the secretary's letters of January fifteenth and sixteenth, transmitting for the consideration of counsel certain correspondence relative to the proposed trackage agreement of the Long Island Railroad Company, the New York, New Haven and Hartford Railroad Company, the Pennsylvania Railroad Company, and the Pennsylvania Tunnel and Terminal Railroad Company, with the New York Connecting Railroad Company, whereby through freight movement may be operated over the tracks of the Long Island Railroad Company and the New York Connecting Railroad Company from Port Morris via the Sunny Side yards and Fresh Pond junction to the Bay Ridge yards, from which point a float service will be operated to Greenville, on the Jersey shore. The secretary's letter states that the Commission desires to be advised as to the legal questions arising in connection with this agreement. First among these is the question whether such an agreement should be submitted, by the companies concerned, for the approval of this Commission, under section 54 of the Public Service Commissions Law. With that question and certain of its inevitable implications this memorandum will deal.

The Public Service Commissions Law of the State of New York provides, in section 54 thereof, that no railroad corporation shall lease or use the tracks or operate under the franchises of another railroad corporation or corporations, "nor shall any contract or agreement with reference to or affecting any such franchise or

right be valid or of any force or effect whatsoever, unless the assignment, transfer, lease, contract or agreement shall have been approved by the proper Commission." This explicit expression of the public policy of the State of New York was enacted in pursuance of the legislative power of the commonwealth and in furtherance of its well-defined policy respecting public service corporations. As the agreement under consideration would relate, in part, to the exercise of the rights, and the use of the tracks, of a railroad located wholly within the city of New York, which constitutes the territorial jurisdiction of the Public Service Commission for the First District, there can be no doubt that this valid requirement of the legislative power of the State calls for the submission of this agreement for the approval of this Commission, unless it be found that something has taken place in the National sphere, affecting these railroad corporations, their franchises, any agreement between them for trackage rights, or the nature and necessity of the operation to take place under this particular agreement, which is to be deemed to remove it from the authority and scrutiny of the legislative power of this sovereign State. The constitutional and legal questions which are presented in this connection are fundamental and vital; they concern the fabric of our whole Federal system of government and are fraught with the most far-reaching consequences as to the future relationship of the National Government to franchise-holding public services.

THE PROCLAMATION OF DECEMBER 26, 1917

The existence of the state of war between the United States and the Imperial German Government was recognized by resolution of the Congress on April 6, 1917, and similar action was taken as to the Imperial and Royal Austro-Hungarian Government on December 7, 1917. At noon on December 28, 1917, under circumstances and for purposes to which I shall presently refer, the President by proclamation took possession and control of the systems of transportation throughout the Continental United States, directed that this control be exercised, and the operation and utilization of the transportation agencies thus taken over be conducted, through Mr.

[Vol. 14]

Public Service Commission, First District

William G. McAdoo as Director-General of Railroads, and gave instructions as follows: "Said Director may perform the duties imposed upon him so long, and to such extent, as he shall determine, through the Boards of Directors, receivers, officers and employees of said systems of transportation. Until and except so far as said Director shall from time to time by general or special orders otherwise provide, the Boards of Directors, receivers, officers and employees of the various transportation systems shall continue the operation thereof in the usual and ordinary course of the business of common carriers in the names of their respective companies."

One of the instrumentalities of railroad management and operation thus continued, though subjected to the authority of the Director-General, was the so-called Railroad War Board, an organization made up of executives of the various railroad corporations, who had been co-operating closely and patriotically, at the instance of the President, in an effort to obtain from voluntary and concerted endeavors of the railway executives something of that unity of operation and maximum utilization of facilities which were deemed necessary for the prosecution of the war. The chairman of the executive committee of the Railroad War Board is Mr. Fairfax Harrison, president of the Southern Railway Company. On December 31, 1917, Mr. Harrison, acting under the authority of the Director-General of Railroads, sent to the Long Island Railroad Company and other affected carriers the following instructions:

"WASHINGTON, D. C., *December 31, 1917.*

"We understand that the New York Connecting Railroad is completed and ready for freight traffic and that the portion of the Long Island over which the New Haven is to operate under trackage is ready, as well as the Bay Ridge Yard, and the float service between there and the Jersey side, and that the use of it is awaiting adjustment of a contract.

"Please proceed to put this facility into use at once and advise that you have done so.

FAIRFAX HARRISON."

A "THROUGH ROUTE" FOR WAR PURPOSES

The joint operation directed by the communication of December 31, 1917, was started on January 15, 1918, but the agreement has not been completed. The facts relative to the matter in this respect are, in brief: The nineteen and sixty-three one-hundredths miles of railroad tracks to which the necessary agreement will relate lie wholly within the State and city of New York. From the point of intersection with the New York, New Haven and Hartford Railroad Company's tracks at Port Morris to Sunnyside yards and thence to Fresh Pond junction, a net distance of eight and three-tenths miles, the tracks used will be those of the New York Connecting Railroad Company. From Fresh Pond junction to the Bay Ridge yards and car-float terminals, a distance of eleven and thirty-three one-hundredths miles, the tracks of the Long Island Railroad Company will be used. On March 28, 1917, this Commission granted an application of the New York Connecting Railroad Company, the New York, New Haven and Hartford Railroad Company, the Pennsylvania Tunnel and Terminal Railroad Company, and the Pennsylvania Railroad Company, for the approval of an essentially temporary agreement for the operation of passenger trains by the New York, New Haven and Hartford Railroad Company over the tracks of the New York Connecting Railroad Company from Port Morris to the Sunnyside yards and thence over the Pennsylvania Tunnel and Terminal Railroad Company's tracks to the Pennsylvania terminal station in Manhattan, pending the execution of formal contracts for such operation, including the use of the terminal station. The temporary agreement thus approved provided that: "Said operation and use by the New Haven Company to be on such basis as may be determined between the parties hereto, in order that the payment to be made by the New Haven Company therefor shall not at any time be greater than it now pays for the movement of its trains between Woodlawn Junction and Grand Central Station and for the use of the latter station. Such basis when actually determined to be submitted for approval to the

[Vol. 14]

Public Service Commission, First District

Public Service Commission for the First District of the State of New York."

The requisite agreement between the various railroad corporations for the use of the tracks of the New York Connecting Railroad Company for freight and passenger service had not been executed or completed when, at the end of December, the President assumed possession and control of the railroad systems of the country and a subordinate of the Director-General gave instructions for the earliest possible starting of a through operation which would bring freight cars from New England directly to tidewater at a point in the less congested portion of the harbor and enable such cars to be conveniently taken by barges to the car-float terminals of the Pennsylvania and other railroad systems along the Jersey shore and on Staten Island. In view of the fact that the loading of munitions and supply ships takes place at points adjacent to the Bay Ridge yards, and the importance that direct, expeditious transport be available between New England manufactories and the mines, oil resources, and timber supply reached by the Pennsylvania and other transportation systems which come to tidewater on the Jersey and Staten Island shore, it will be seen that the through route ordered established by the mandate of December 31, 1917, has a direct bearing on the conduct of the war. The port and harbor of New York, and all its adjacent net-work of transportation systems which carry supplies or carry workers to and from points where functions of transportation, material-supply, ship-building, and similar wartime concerns, are advanced, are little less than a base-depot of the firing-line in France.

CONTEMPLATED TERMS OF THE AGREEMENT OF THE CARRIERS BETWEEN THEMSELVES

No agreement fixing the compensation to be paid the several carriers for the use of their facilities under through operation having been perfected by the companies, it is proposed to apply to the Director-General to fix the compensation as well as the general nature of the through operation. The negotiations between

the companies are stated to have contemplated an arrangement whereby the New York, New Haven and Hartford Railroad Company, as the operating agent of the New York Connecting Railroad Company, will move its own trains, with its own power, manned with its own crews, and in all respects at its own expense, over the lines of both the New York Connecting Railroad Company and the Long Island Railroad Company, from Port Morris to Bay Ridge, so far as the handling of through traffic is concerned, whether in connection with governmental or other needs or not. All traffic for local delivery in the territory covered by the trackage agreement is to be delivered by the Long Island Railroad Company and handled by it at its regular rates, so that the Long Island Railroad Company may continue to receive the revenue from its local territory, including any interchange with the Bush Terminal railroad, on the Brooklyn water-front. The contemplated terms of compensation to the Long Island Railroad Company had been a rental of one-half of the interest at $4\frac{1}{2}$ per cent per annum on the cost of the completed property devoted to the joint arrangement, and also one-half of the interest on the agreed cost of all additions, extensions and betterments. In addition to this, the cost and expense of operation (covering only the joint expense of supervising, signalling, policing, accounting, and directing the operations of the facilities jointly used, and not including the crews and engines devoted exclusively to the traffic of each company), together with the cost and expense of maintenance, including renewals and replacements of said railroad and property, the taxes, cost of insurance, and any other expenditure imposed by law or regulation, chargeable to operating expense, to be pro-rated on the basis of number of cars and engines moved over the road, the proportion differing on various sections of the road. The cost of the improvements and development of the property, properly chargeable to the joint facility, is between \$11,500,000 and \$12,000,000, the exact figure not yet having been agreed upon between the companies. The foregoing comprises the basis of the application to the Director-General of Railroads for ascertaining and fixing the compensation. When this

[Vol. 14]

Public Service Commission, First District

has been determined, the agreement between the companies will be completed and executed. The question is therefore presented whether such an agreement, made under the circumstances indicated, can be "valid or have any force or effect" until it has been approved by this Commission. This in turn depends on the effect of the Presidential action upon the enactments and declared policy of the legislative power of a State. There is also suggested the inquiry as to the precise nature and limitations of the Presidential act in taking over the railroads, because at least the Long Island Railroad Company has indicated its belief that because the compensation to be paid it by the other companies under the contemplated trackage agreement for through traffic had not been determined before December 28, 1917, the amount of this compensation, as well as the amount of the compensation to be paid to any of the companies by the National government for the movement of governmental traffic over the through route, must now be determined by the Director-General of Railroads.

THE NATIONAL LEGISLATIVE POWER AS TO RAILROADS

The powers of the National Government over railroad transportation are derived from article I, section 8, subdivision 3, of the Constitution, which vests the Congress with "power to * * * regulate commerce * * * among the several States." Railroads being regarded as a specialized form of highway and facility of commerce, their interstate operations were looked upon as within the purview of Federal power. The constitutional grant being to the Congress, it was early established that the Federal authority over interstate transportation is legislative in character; "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." This "plenary" power was held to be vested in the Congress as absolutely and as broadly and exclusively "as it would be in a single government." In times of peace, therefore, the regulation of railroad transportation and its agencies is in all respects a legislative function; the President and other administrative officers have powers and duties as to the railroads only to

the extent that the legislative power has been delegated and they have been intrusted with the task of carrying out the legislative rules enacted by the Congress. The coming of war and the necessity of providing for the common defense bring new exigencies and new aspects of the exercise of the power of the National Government over the avenues of transport for troops and supplies; new emergencies and necessities have to be dealt with through new expedients, and new courses of action, unthought of or even outside the pale of legal sanction yesterday, are found suddenly to constitute the direct, and even the necessary, mode of dealing with to-day's situation. At the same time, it cannot accurately be said that there is constitutional sanction or precedent for the conception that the existence of a state of war transfers to the President legislative powers respecting railroads. He is Commander-in-Chief of the army and navy; he has plenary power of direction and command as to them, their movements, and the conduct of campaigns. The most perfect phrasing ever put to paper to express the historic relation of the Executive power to war is probably that contained in the LXXIVth paper of the Federalist, where Hamilton wrote: "Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority."

"WAR POWERS" OF THE PRESIDENT

According to the emergency, the President has power in time of war to take and utilize such private property as may be necessary for the supply and maintenance of troops in the field or the seasonable movement of the army and navy to such places as he deems necessary to the conduct of the campaigns. The coming of war greatly intensifies and broadens his powers, in extent and in freedom of action and ability to deal summarily with new conditions as the military or naval emergency may demand; but

[Vol. 14]

Public Service Commission, First District

war does not change his powers as to their kind and nature or operate automatically to transfer to him power essentially legislative in character, even concerning matters with some aspects of which he deals by virtue of the exigencies of military command. He continues to be, even as to military matters, the official charged supremely with seeing to it that the laws are faithfully executed. The power "to provide ways and means" for carrying on the war, to promulgate "the legislation essential to the prosecution of the war with vigor and success," remains in the Congress, which is clothed with plenary authority to make all laws which shall be necessary and proper for carrying into execution the powers vested in the Congress and in other departments of the Government. It is the Congress which is vested with the "power to * * * raise and support armies" and this extends to all the facilities of their equipment, maintenance, transportation to muster-point camp or battle-field and their general effectiveness in the field. The authority and duty of the Congress in respect to provision for these things incident to the "support" of the army, and the Congress's "control over the subject," has been said by the Supreme Court to be "plenary and exclusive." Ordinarily and as a matter of general provision and rule, it is indubitably the function of the Congress to make available to the President the moneys, supplies, facilities of transport, and other instrumentalities requisite for the carrying on of the war; the President's power as to such facilities and instrumentalities are based upon the requirements of a military or naval emergency, and not upon the mere existence of a state of war.

"WAR POWERS" OF THE CONGRESS

It is of course true that the coming of the greatest stress and need which can confront a Nation brings far-reaching expansion of the powers of government and gives sanction to many acts and measures for which, in times of peace, it would be difficult to find warrant or reasonable relationship to the carrying out of the objects of the Federal Union under peace conditions. The "war power" of government is plenary, and it would be difficult,

and usually unsafe, to try to formulate generalizations defining its metes and bounds. Within and through its organic framework, the National Government becomes vested with well-nigh absolute powers of decision and action, and the necessities of defense and common preservation may dictate, and the means adopted for the carrying out of the constitutional objectives may be selected for, and adapted to, the emergency. At the same time, it is constitutionally unsound to assume the "war powers" of the President to be identical and coterminous with the "war powers" of government. Congress may, and usually does, make sweeping grants of power to the President, whereby he is for the emergency vested with great freedom of action in carrying out "war powers" of Congress as well as his own powers as Commander-in-Chief, but this, again, does not mean that the President or his appointees acquire legislative powers or administer legislative concepts of policy, except in pursuance of Congressional grant. The sweeping character of the "war powers" of the Congress, even in limitation on those of the Executive, were long ago expressed by Chief Justice Chase, who ruled that "Congress has the power, not only to raise and support armies, but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, *except such as interferes* with the command of the forces and the conduct of campaigns. That power and duty belong to the President as the Commander-in-Chief."

Chief Justice Taney said that the legislative authority "is not a part of the power conferred upon the President by the declaration of war. His duty and his power are purely military. As Commander-in-Chief he is authorized to direct the movements of the naval and military forces placed *by law* at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy."

THE BASIS FOR THE PROCLAMATION OF DECEMBER 26, 1917

Turning from these fundamental observations to the Presidential proclamation of December 26, 1917, we find that the

[Vol. 14]

Public Service Commission, First District

President undertook and purported to "take possession and assume control of" the railroad system "through Newton D. Baker, Secretary of War," and that he stated that he did this "under and by virtue of the powers vested in me by the foregoing resolutions and statute, and by virtue of all other powers thereto enabling." The "foregoing resolutions" were those declaring a state of war to exist between the United States of America and the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, and reciting that "to bring the conflict to a successful termination all of the resources of the country are hereby pledged by the Congress of the United States." The "statute" referred to and quoted in the Presidential proclamation was the provision of section 1 of the act approved August 29, 1916, entitled "An act making appropriations for the army for the fiscal year ending June 30, 1917, and for other purposes," as follows: "The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

The quotation of this provision of the 1916 Army Appropriation Bill is followed, in the proclamation of December 26, 1917, by the following recital: "And, whereas, it has now become necessary in the national defense to take possession and assume control of certain systems of transportation and to utilize the same, to the exclusion as far as may be necessary of other than war traffic thereon, for the transportation of troops, war material and equipment therefor, and for other needful and desirable purposes connected with the prosecution of the war."

The proclamation thus stated the purpose of the taking over of the "systems of transportation" by the President through the Secretary of War: "To the end that such systems of transportation be utilized for the transfer and transportation of troops, war

material and equipment to the exclusion so far as may be necessary of all other traffic thereon, and that so far as such exclusive use be not necessary or desirable, such systems of transportation be operated and utilized in the performance of such other services as the national interest may require and of the usual and ordinary business and duties of common carriers."

"PURPOSES CONNECTED WITH THE EMERGENCY"

It will be noted that the Presidential action is stated to be predicated on the two-fold ground: *first*, the exercise of the "war power" vested in the Executive by virtue of the declaration of war, and, *second*, the utilization of the legislative power which the Congress had in advance conferred upon the President if and when "time of war" should come. The action taken and the procedure and phraseology followed conform closely to that set out in the act of August 29, 1916, and it is palpably upon that statute that the Presidential action leans most heavily for support. In fact, the President's address to the Congress on January 4, 1918, referred only to the statute as conferring and constituting the authority under which action was taken, and said that "this step seemed to be imperatively necessary in the interest of the *public welfare; in the presence of the great tasks of the war.*" Examination of the statute, however, discloses that its purport is little, if any, broader than an explicit formulation and legislative confirmation of the emergency "war powers" inherent in the Presidential office through the President's status as the Commander-in-Chief responsible for the movements and the efficient conduct of the army and navy. Were the war against German autocracy already being fought on American soil, with the troops of the invaders gathering in serried ranks to overwhelm vital centers of our National life, few would question the power of the President, irrespective of Congressional sanction, to take possession of the railroad lines requisite for the movement of troops, supplies or other incidentals of maximum National efficiency in the war; to operate and utilize these lines as a unit, to secure the best possible results in handling of troops and the maintenance of adequate supplies; and to exclude from the rail-

[Vol. 14]

Public Service Commission, First District

roads all other traffic, so far as might be necessary to enable the most advantageous meeting of the emergency. At least *that* power would belong to the Commander-in-Chief of the army and navy in such an emergency, irrespective of Congressional delegation; and I conceive that it belongs to the President no less, under the conditions of the present war, which make it clear that unless from our Atlantic ports our Navy secures continuous and adequate supplies of coal and ammunition, and unless a steady stream of troops, food, aeroplanes, munitions, and other supplies to France can be kept going in adequate proportions, the sure alternative will be an ignominious peace or an eventual struggle with the German invader on our own soil or both. Examination of the act of August 29, 1916, discloses that, except possibly in two respects, its language is that of legislative confirmation of "war powers" of the President, rather than Congressional delegation of additional or *quasi* legislative powers. The two possible exceptions are: (1) the President is authorized by the statute to take possession of the transportation systems "in time of war;" his executive powers as Commander-in-Chief would sanction such a course only when and as a military emergency dictated, and not merely because of the existence of a state of war; and (2) the President is authorized "to utilize" the systems of transportation "for such other purposes connected with the emergency as may be needful or desirable." What is "the emergency?" If it is the "transfer or transportation of troops, war material or equipment," then clearly the executive power is in no respect broadened. If "the emergency" is the war, and Congress has undertaken to empower the President to "utilize" the railroads "for such other purposes connected with the" war "as may be needful or desirable," there may be here a delegation of a measure of Congressional powers. On the whole, I do not believe that powers vested essentially in the Congress have yet been granted to the President or the Director-General of Railroads. That powers of administering legislative directions and authorizations as to the railroads will later be delegated by Congress seems likely, in view of the provisions of the bill now pending in Congress, prepared under the general oversight of the Director-General.

CONGRESSIONAL AUTHORITY OVER THE "COMPENSATION" OF
THE CARRIERS

As bearing upon the nature of the powers in pursuance of which the President acted, it is of interest to note that, rather contrary to the common impression, he did not undertake to fix by proclamation the "just and reasonable compensation" to be paid to the carriers by the Federal Government for the "possession, use and control of the respective properties." He only gave instructions that the Director-General "shall, as soon as may be after having assumed such possession and control, enter upon *negotiations* with the several companies looking to *agreements* for just and reasonable compensation for the possession, use, and control of the respective properties on the basis of an annual guaranteed compensation above accruing depreciation and the maintenance of their properties, equivalent, as nearly as may be, to the average of the net operating income thereof for the three-year period ending June 30, 1917, the results of such negotiations to be reported to me for such action as may be appropriate and lawful. But nothing herein contained, expressed or implied, or hereafter done or suffered hereunder shall be deemed in any way to impair the rights of the stockholders, bondholders, creditors, and other persons having interests in said systems of transportation or in the profits thereof, to receive just and adequate compensation for the use and control and operation of their property hereby assumed." Examination of the Administration bill introduced in Congress on the day of the President's address and referred to by him as drafted to carry out the purposes of his proclamation, discloses that the whole matter of compensation to the carriers is treated as within the purview of legislative powers. A rule and basis of payment is set up; the President is "authorized" to administer and apply it, by contract and guaranty; the determination of the "amount of the standard return," which underlies the legislative rule of compensation, is intrusted to the Interstate Commerce Commission, whose finding and certificate is made "for the purpose of such *agreement* and guaranty," final and conclusive; and elaborate provisions are made and special

[Vol. 14]

Public Service Commission, First District

machinery set up for the judicial determination of the amount of compensation to be paid any carrier whose claim is not adjusted on a contract basis. Careful reading of these and other provisions of the proposed law lead to the conviction that although the taking possession and assuming control of operation of the railroads was predicated on the "war power," a great deal more is now contemplated which will find validity, if at all, in the ordinary powers of Congress over the instrumentalities of interstate commerce. For example, as we have seen, the Congressional power and duty to make provision for the "support" of armies includes provision for their transportation to localities prescribed by the Commander-in-Chief and the transportation of the supplies requisite for their military efficiency. But the Constitution provides that "no appropriation of money to that use shall be for a longer term than two years." If the Congressional appropriation of moneys in connection with the taking over of the railroads is to be deemed predicated solely, or even principally, on "war powers" of either the President or the Congress, may any such law validly contain provisions for indefinitely "revolving funds" and the use of appropriated moneys for railroad purposes "until the Congress shall otherwise direct?" The absence of compliance with the constitutional limitation on the period of the use of appropriations for military purposes tends strongly, as do other provisions of the bill, to my belief that no small part of its contents is builded and based upon "the power to regulate commerce among the States," and so could not operate to suspend or abrogate the application of the State legislative power to intrastate operations, franchises, and statutory conditions.

"THE INTEREST OF THE PUBLIC WELFARE"

The President's address of January 4, 1918, seems to recognize a purpose to go considerably beyond the requirements of the Presidential administration of the railroads for the movement of troops and supplies, and seems also to recognize the authority of Congress over the subject, because, in addition to stating that the action taken "seemed to be necessary in the interest of the

public welfare," the President's address to Congress declared: "While the present authority of the Executive suffices for all purposes of administration, and while, of course, all private interests must for the present give way to the public necessity, it is, I am sure you will agree with me, right and necessary that the owners and creditors of the railways, the holders of their stocks and bonds, should receive from the Government an unqualified guaranty that their properties will be maintained throughout the period of Federal control in as good repair and as complete equipment as at present, and that the several roads will receive under Federal management such compensation as is equitable and just alike to their owners and to the general public. I would suggest the average net railway operating income of the three years ending June 30, 1917. I earnestly recommend that these guaranties be given by appropriate legislation, and given as promptly as circumstances permit."

In fact, the whole scope and plan of the Administration measure seems to sustain the fundamental point of view hereinbefore expressed. The title of the bill is "An act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes." The duration of the application of the provisions of the bill is stated in its last section as follows:

"Section 13. The Federal control of transportation systems herein and heretofore provided for shall continue for and during the period of the war and until Congress shall thereafter order otherwise."

SCOPE OF THE PENDING BILL

The bill undertakes to make provision on the following matters which seem to me to fall clearly within the legislative powers of the Congress, most of them within its regulative powers under the "commerce clause:"

Authorization to contract for payments to the carriers of "just compensation" "during the period of such Federal control."

Provision of a rule of compensation based on "average net

railway operating income for the three years ending June 30, 1917 * (called herein standard return)," and provision that the President and Director-General shall be bound by the Interstate Commerce Commission's determination of the amount of the standard return of each carrier.

Provision that during the period of Federal control, adequate depreciation and maintenance of properties shall be deemed a part of operating expenses or provided for through a reserve fund.

Creation of a machinery for the ascertainment of the "compensation" of such carriers as enter into no agreement.

Regulation of dividends "while under Federal control."

Creation of a "revolving fund" out of Congressional appropriations, to be used in paying any deficits below the standard return, the cost of improvements ordered by the President, and the like.

Delegation of power to the President "to make or order any carrier to make any additions and improvements necessary or desirable for *war purposes or in the public interest.*"

Authorization of the issuance of such securities "as the President may approve as consistent with the public interest."

Authorization of the purchase of corporate securities out of the "revolving fund."

Provision respecting the indemnity of carriers' employees as to accidents, etc., "while carriers are under Federal control."

Regulation of the issuance and service of process against carriers.

* Subsequently to the rendering of the above opinion, it was announced (on January 24, 1918) that the "compensation" section of the Administration bill has been re-written in large part, by Interstate Commerce Commissioner Anderson, who prepared the original draft, so as to make the "standard return" depend on the net railway operating income for the calendar years 1915-16-17, and alter also in certain other respects the basis of "compensation" indicated in the President's proclamation and message. That this change in plan and basis is to be brought about *legislatively*, rather than by Executive proclamation, tends to confirm the conclusions expressed in the above opinion.

Provision of penalties and fine and imprisonment for violation of the act or interference with railroad property.

Appropriation of \$500,000,000 as nucleus for the "revolving fund," to be held and used "until disposed of as Congress may hereafter provide by law."

AN EXERCISE OF LEGISLATIVE POWERS

It is noteworthy that unlike the act of August 29, 1916, the proposed bill contains no reference to the use of the railroads for the movement of troops or supplies, no provisions relate to the exclusion of ordinary traffic to give precedence to troops or to war freight, no reference to the war at all in its title, and no evidence of intent to base the measure on "war powers" alone.* "While under Federal control" and "as the public interest may require," seem to be its two underlying concepts of authority. The measure in entirety seems to have been conceived and drafted as a plan for the rehabilitation of railroad finances and rolling-stock, under Presidential direction, during an indefinite period of Federal control, rather than as an emergent measure for the better military handling of troops and supplies.

On December 29, 1917, the Director-General of Railroads issued General Order No. 1, which provided, among other things, as follows:

"Until further ordered, directed that:

"1. All officers, agents and employees of such transportation

*On January 24, 1918, subsequently to the submission of the foregoing opinion to the Commission, announcement was made in Washington that the Administration bill had been amended, with the sanction of the Director-General, so as to contain, in its last section, the following provision, which can hardly be regarded as resolving any of the matters discussed, or adversely affecting any of the conclusions reached, in this memorandum: "That the Federal control of transportation systems herein and heretofore provided for shall continue for and during the period of the war and until Congress shall thereafter order otherwise. But this act is expressly declared to be emergency legislation enacted to meet conditions growing out of war; and nothing herein is to be construed as expressing or prejudicing the future policy of the Federal Government concerning the ownership, control, or regulation of carriers or the method or basis of the capitalization thereof."

system may continue in the performance of their present regular duties, reporting to the same officers as theretofore and on the same terms of employment. * * *

" 3. All transportation systems covered by such proclamation and order shall be operated as a national system of transportation, the common and national needs being in all instances held paramount to any actual or supposed corporate advantage. All terminals, ports, locomotives, rolling stock and other transportation facilities are to be fully utilized to carry out this purpose without regard to ownership. * * *

" 6. Through routes which have not heretofore been established because of short hauling or other causes are to be established and used whenever expedition and efficiency of traffic will thereby be promoted; and if difficulty is experienced in such through routing notice thereof shall by carriers or shippers or both be given at once to the Director by wire."

No doubt in detailed furtherance of this general order, the directions of December 31, 1917, regarding this particular through routing and trackage arrangement, were promulgated.

CONCLUSIONS

Turning, then, to the question particularly before this Commission in relation to the Port Morris-Bay Ridge operation, I am of the opinion that the foregoing summary of the constitutional principles which seem to be derivable from the decided cases leads to the following conclusions:

(1) The President was fully empowered, both by act of Congress and by inherent "war powers," to "take possession and assume control of, and operate" the railroad transportation systems of the country.

(2) In so doing, the President, through the Director-General of Railroads and such subordinates and assistants as the Director-General may select, is empowered to bring about the operation of the railroads in such a way as will best utilize them for the transportation of troops, munitions, and supplies. To this end, he is empowered to exclude other traffic, passenger or freight, from the

railroads or any part of them, so far as seems necessary in order to have the functions of war transportation most quickly and adequately fulfilled. Ordinary traffic and ordinary "peace" uses of railroads may be subordinated and required to await the passing of the military exigency. To the same end, the Director-General has plenary power to disregard usual routings, distinctions as to ownership of tracks or equipment, and the like, and establish such through operation, over whatever lines and with whatever available rolling-stock and employees, as shall seem to him to afford the most expeditious transportation for troops and essential supplies.

(3) Neither the Congress nor the inherent powers of the Commander-in-Chief have yet vested the President or his Director-General with authority to do essentially more than this. Questions of the compensation to be paid to the owners of property taken for war purposes are legislative and judicial, not executive, and I do not believe that anything has yet been done which empowers the President or the Director-General to fix compensation to be paid to the owners of the railroad properties for the rental or use of their lines or the damage they are to be deemed to have sustained therefrom.* Those questions as to these railroads, even

* Of significance in this connection is the information conveyed by an Associated Press dispatch from Washington under date of January twenty-eighth: "Because of the importance of the question to all railroads in adjusting the amount of compensation which they will receive under Government operation, the Supreme Court was asked to-day to give an early opinion in the suit of the Baltimore and Ohio Railroad against the Western Union Telegraph Company, involving an interpretation of the Interstate Commerce Commission orders which fix the basis of pay for exchange of services between railroads and telegraph companies. In the lower court the Western Union was restrained from violating a contract made with the Baltimore and Ohio in 1887 providing for the use of the railroad company's right of way by the telegraph company's lines and for the exchange of services between them. The telegraph company refused to transmit messages on the agreed terms, asserting that the Commission's order interfered." Evidently there is not universality of view that even questions as to the amount of compensation to be paid by the Government to the carriers, or compensation *inter se*, are to be resolved by the ready method of application to the Director General.

[Vol. 14]

Public Service Commission, First District

in war-time, are in the last analysis determinable pursuant to ordinary rules of private and public right, through such machinery as the Constitution or the Congress may establish for the purpose. Congress may, and probably will, legislate on the subject, declare the basic plan of the carriers' compensation, authorize adjustment of the matter by agreement where possible, and perhaps set up some special machinery for the determination of claims not thus adjusted, as is contained in the Administration bill. Pending such an enactment, however, I do not believe the President or the Director-General has been vested with authority to determine any of these legislative matters, or any matter relating to the ordinary rights, franchises, operations, and arrangements of the carriers between themselves, except to the extent that operation may be controlled and service adjusted so as to best serve the war needs.

STATE LAWS STILL APPLICABLE TO THE PROPOSED AGREEMENT

(4) From this I conclude that the Director-General had power to require the New York, New Haven and Hartford Railroad Company, the Long Island Railroad Company, and the New York Connecting Railroad Company, to establish through operation from Port Morris to Bay Ridge and continue it during the war. For this, no agreement between the companies is requisite; it arises from Federal mandate. The rates to be charged by the companies for privately-owned freight carried over this new through route, and the compensation to be paid to any of the companies by the National Government, remain for legislative and judicial consideration. No power to determine these matters, or the payment which one carrier shall make to another, has yet been vested in the Director-General, although of course it is entirely competent for the carriers to agree that the amount or basis of such payment to be inserted in the proposed agreement shall be determined for them by the Director-General. I am of the opinion that no power to fix rates, interstate or intrastate, has yet been conferred by Congress, and, independently of such submission and consent by the carriers, no power to fix the compen-

sation of the carriers *inter se* or other terms of any trackage agreement the companies may see fit to make. These matters remain subject to the usual legislative power and policy of the United States and the several States; train operation and service for war purposes have been committed to the Director-General and his subordinates.

INSTRUMENTALITIES AT THE COMMAND OF THE DIRECTOR-GENERAL

(5) The Director-General may exercise his powers through such assistants and auxiliaries as he may determine and designate. He may act in part through existing officials, boards and committees brought into being by the railroad corporations prior to December 28, 1917; he may utilize, and act through, the members and staffs of the Interstate Commerce Commission and the various State Commissions. He has in fact been proceeding along both these lines, and has thus gained the benefit of existing organizations and accumulated data and experience on both the carriers' and the public's side of railroad matters. Except in so far as concerns the movement of trains and the adjustment of traffic methods to meet the Nation's emergency, the transportation affairs of the companies, including rates, service to private consignees, adequacy of facilities and the like, remain in the hands of the companies themselves and remain likewise subject to the ordinary regulative authority, Federal and State, in the public interest. Congress may confer on the Director-General, the Interstate Commerce Commission, or even the State Commissions, additional powers, legislative in character and adapted to the present emergency. Until this is done, the usual powers of the Interstate Commerce Commission and the State Commissions continue unimpaired, except as to such matters as directly or indirectly involve the objects specified in the act of August 29, 1917, and the Presidential proclamation. As to the matters so specified, the military mandate of the Executive would, unless otherwise directed by the Executive, *ipso facto* supersede or be paramount to any provision of State laws or Commission orders regulating privately-operated

railroads. As to matters outside of the military necessity, I do not believe that the Executive power could authorize the disregarding of State regulative measures. In point of fact, the Presidential proclamation thus explicitly recognizes and sanctions the continuing effect of existing statutes and Commission orders: "Until and except so far as said Director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission, and to all statutes and orders of regulating commissions of the various states in which said systems or any part thereof may be situated. But any orders, general or special, hereafter made by said Director, shall have paramount authority and be obeyed as such."

It is at least true, therefore, that this agreement should be submitted for the approval required by the State laws, for the reason that the Director-General has not undertaken to order otherwise.

UNDIMINISHED POWERS OF THE STATE

(6) As to the proposed agreement of the companies for track-age rights and compensation *inter se*, I am of the opinion, however, that any such agreement falls within the scope of the undiminished power of the State over its franchises and corporate creatures. The compensation to be paid by the National Government for its use of the through facilities will be determined in such manner as the Congress will prescribe, but if the companies establish a general through-traffic agreement, I think there can be no doubt that, under the terms of the Presidential proclamation of December 26, 1917, or irrespective of those terms, the agreement which these companies are negotiating should be submitted for approval of this Commission and will have no validity, force or effect until so submitted and approved. I do not believe that the Director-General would have, under the Presidential proclamation or any authority yet delegated by the Congress, power to take this proposed agreement out of the operation of the State laws and policy. I do not believe that anything has taken place to supersede the necessity of Commission action as to a proposed

voluntary agreement of carriers *inter se*, as to the operation of a railroad located wholly within the city of New York, for the carriage of the freight of ordinary consignees pursuant to published tariffs, the duration of such agreement to be for a period considerably in excess of any probable duration of the war.

CURRENT DISCUSSION IN WASHINGTON

For the information of members of the Commission, I may say that I have recently been in Washington and have conferred on the general subject with members of the Interstate Commerce Commission, including Commissioner Anderson, the distinguished member of the Boston Bar who is understood to have taken a principal part in the drafting of the proclamation of December 26, 1917, and the Administration bill now pending in Congress with the general approval of the Director-General. I was also present one of the days on which Commissioner Anderson was under examination by the Senate committee on interstate commerce concerning the proclamation and bill, and had the benefit of hearing the questions and comments of Senators Cummins, Underwood, Pomerene and other eminent Congressional authorities on the "commerce clause" of the Federal Constitution. I have also been in touch with members of the Legislative committee of the National Association of Railroad and Public Utility Commissioners, who have been much in Washington lately and had a conference a few days since with Director-General McAdoo. It is my information that in this conference the Association's Legislative committee were assured by the Director-General that he desires the fullest aid and cooperation of the State Public Service Commissions and has no thought of undertaking to suspend or supersede their exercise of, or the railroad corporations' compliance with, the regulatory powers hitherto vested in these State bodies, respecting the rates, franchises, and rights of the railroad corporations. Testimony given by the Director-General before the Senate and House committees on interstate commerce a few days later leaves a degree of doubt whether the Director-General has so broadly conceived the con-

tinued exercise of the regulatory powers and duties of the Interstate Commerce Commission and the State Commissions. In the foregoing communication, I have not undertaken to state the views of any of those with whom I have talked, or any consensus of opinion reached in Washington; I have only set forth my own conclusions from the decided cases, with the aid and benefit of the discussions which have been currently taking place in Washington.

STATE COOPERATION WITH THE DIRECTOR-GENERAL

Two things remain with propriety to be said: In the first place, this is no time for controversy or joinder of issue as to the respective confines of Federal and State power. Any present inquiry as to the scope of the powers thus far vested, or to be vested, in the President and Director-General of Railroads and the effect of those powers upon the established public policy of the several States, involves no suggestion of the hampering of the Director-General in the great task to which the emergency has summoned him. Upon the part of each and all of the State regulatory agencies, there has been manifested only a desire to cooperate and help, and to place at the command of the Director-General the existing staffs and powers of the State Commissions, to be utilized by him in any needful way, even as he has wisely utilized the staffs and the experience of existing railroad organizations. The instinctive patriotism of those trained in public service will dictate cooperation on their part with Federal authorities; and, in case differences of opinion develop as to the constitutional aspects of anything deemed vital to the prosecution of the Nation's task, there will be broad willingness to subordinate independent judgment for the time being to the views of the President and his assistants in the great work of "directing and employing the common strength" for war. Fortunate indeed will it be if those who ordinarily have represented the forces of opposition to public control come now to act with equal deference to the paramount need. Those who would clamorously insist now upon meticulous observance of the ordinary confines of governmental

action should recall for guidance the historic language of Chief Justice Chase, in speaking of another era of war: "The time was not favorable to considerate reflection upon the constitutional limits of legislative power or executive authority. If power was assumed from patriotic motives, the assumption found ready justification in patriotic hearts. Many who doubted yielded their doubts; many who did not doubt were silent."

At the same time, in dealing even with the supreme tasks of the war, it is practicable to take care that the channels and concepts of official action shall not needlessly be made such as to do violence to fundamentals of our policy. There is danger lest these bases of the protection of public interests be unnecessarily sacrificed, or the opportunity utilized to do them irreparable harm. The present inquiry, therefore, is directed to the wholesome task of ascertainment whether such powers have been, or should be, conferred and exercised as would result in the summary abandonment of the progress made in regulative matters during the hard struggle of the past thirty years and leave much of the contest for the public right to be fought all over again, once the railroads are returned to private operation, should that time come, at the end of the war or afterwards. For example, irrespective of any question of the power of the Director-General to suspend the operation of State laws, would it not be preferable that even as to the formal and highly technical matter of the filing of tariffs, existing methods for the public protection, carefully built up over a long period of years, should be continued, rather than that so much of progress should be discarded? The State Commissions, even as the Interstate Commerce Commission, can make available to the Director-General a wealth of information and a kind of assistance, as to local conditions and operating possibilities, such as he could procure from no other source. In the second place, it would be a rash counsellor who, at the opening of such a struggle as that in which this Nation is now preparing to engage, would undertake to indicate the metes and bounds of the "war powers" of either the President or the Congress, or to say that any particular method of employing and directing "the common

[Vol. 14]

Public Service Commission, First District

strength" will not be later found to be essential to the carrying on of the war. It is by no means inconceivable that with respect to many matters, including all aspects of railroad operation and finance, the Congress will make President Wilson virtually a dictator, as it did Abraham Lincoln. In the ultimate analysis, there may be no limitations on the power of government to do what seems most in the interest of the common cause, and dire need and new conditions may not improbably make short shrift of existing precedents and concepts. But as matters stand to-day, I have confidence in the correctness of the conclusions hereinbefore set out.

I return to you herewith the papers transmitted by the secretary, and suggest that the railroad companies concerned be advised of the view of the Commission that the agreement referred to should be speedily completed and submitted for the approval of this Commission, pursuant to section 54 of the Public Service Commissions Law, such agreement, any action of the Commission thereon, and all operation thereunder, to be specifically made subject to all lawful orders and directions of the President and Director-General during the period of the war.

PUBLIC SERVICE COMMISSION

SECOND DISTRICT

PETITION OF CARRIERS FOR RELIEF from the Provisions of Section 36 of the Public Service Commissions Law, as Amended by Act Approved June 9, 1917, so as to Permit Ordinary Changes in Rates Pending Action upon Applications for Relief from the Provisions of Said Section

Case No. 6072

(Public Service Commission, Second District, August 14, 1917)

Freight rate changes for convenience of carriers.

Common carriers operating within the Second District applied through their joint agent for leave to make incidental rate changes where such action will be obviously for the convenience of the public and themselves.

BY THE COMMISSION.— Upon application of the carriers operating within the jurisdiction of this Commission, filed August 4, 1917, by C. C. McCain, their joint agent, it appearing to the Commission that the convenience of the carriers, the public, and the Commission will be better served by granting the relief prayed for in said application, therefore, it is ordered

1. That as to and confined in all cases to freight rates which are included in and covered by applications for relief from the provisions of section 36 of the Public Service Commissions Law of the State of New York, as amended by act approved June 9, 1917, that were filed with the Commission on or before August 4, 1917, and until such applications including and covering such freight rates have been passed on by the Commission, carriers may file with the Commission, in the manner and form prescribed by law and by the Commission's regulations, such changes in rates as occur in the ordinary course of their business, continuing higher

rates at intermediate points, and through rates higher than the combination of intermediate rates, providing that in so doing the discrimination against intermediate points is not thereby increased.

2. That as to and confined in all cases to freight rates which are included in and covered by applications as hereinbefore described, carriers may file, in the manner and form prescribed by law and by the Commission's regulations, changes in rates under the following conditions, although the discrimination against intermediate points is thereby increased:

Sec. 1. A through rate which is in excess of the aggregate of the intermediate rates lawfully published and filed with the Commission may be reduced to equal the sum of the intermediate rates.

Sec. 2. Where a through rate has been, or is hereafter, reduced under the authority of section 1 of this order, carriers maintaining through rates via other routes between the same points may meet the rate so made by the route initiating the reduction.

Sec. 3. Where a reduction is made in the rate between two points under the authority of section 1 of this order, such reduction may extend to all points in the group which take the same rates as does the point from or to which the rate has been reduced.

Sec. 4. Where through rates are in effect which exceed the lowest combination of rates lawfully published and filed with the Commission, carriers may correct said through rates by reducing the same to equal such lowest combination.

Sec. 5. A longer line or route may reduce the rates in effect between the same points or groups of points to meet the rates of a shorter line or route when the present rates via either line do not conform to section 36 of the Public Service Commissions Law, under the following circumstances:

(a) Where the longer line is meeting a reduction in rates initiated by the shorter line.

(b) Where the longer line has not at any time heretofore met the rates of the shorter line.

Sec. 6. A newly constructed line publishing rates from and to its junction points under the authority contained in paragraph (b)

of section 5, may establish from and to its local stations rates in harmony with those established from and to junction points.

Sec. 7. Carriers whose rates between certain points do not conform to section 36 of the Public Service Commissions Law, which rates have been made lower than rates at intermediate points to meet the competition of water or rail-and-water carriers between the same points, may make such further reductions in rates as may be required to continue to effectively meet the competition of rail-and-water or all-water lines.

Sec. 8. Where rates are in effect from or to a point that are lower than rates effective from or to intermediate points, carriers may extend the application of such rates to, or establish rates made with relation thereto at, points on the same line adjacent or in close proximity thereto, provided that no higher rates are maintained from and to points intermediate to the former point and the new point to which the application of the same or relative rates has been extended.

Sec. 9. Where there is a rate on a commodity from or to one or more points in an established group of points from and to which rates are ordinarily the same, but the rate on the said commodity does not apply at all points in the said group, such rate may be made applicable to or from all of such other points.

Sec. 10. Where there is a definite and fixed relation between the rates from and to adjacent or contiguous groups of points, and the rates to or from one of said groups are changed, corresponding changes may be made in the rates of the other groups to preserve such relation.

Sec. 11. In cases where no through rates are in effect via the various routes or gateways between two points, and the combination of lawfully published and filed rates via one gateway makes less than the combination via the other gateways, a through rate may be established on the basis of the combination via the gateway over which the lowest combination can be made, and made applicable via all gateways.

Sec. 12. In cases where through rates are in effect between two points, via one or more routes or gateways, which are higher than

[Vol. 14]

Public Service Commission, Second District

the combination of lawfully published and filed rates via one of these gateways, different carload minima being used on opposite sides of the gateway, a through rate may be established equal to the lowest combination of lawfully published and filed rates, using the higher of the carload minima but continuing the present higher through rate if based upon a lower carload minimum.

The Commission does not hereby approve any rates that may be filed under this authority, all such rates being subject to protest, suspension, complaint, investigation, and correction if considered to be in conflict with any of the provisions of the laws of the State of New York.

3. That when the Commission passes upon any application for relief from the provisions of section 36 of the Public Service Commissions Law, as amended by act approved June 9, 1917, with respect to the rates referred to herein, the order issued with relation thereto will automatically cancel the authority herein granted as to the rates covered and affected by such order.

In the Matter of the Complaint of SAMUEL G. TRACY, M. D., of New York City, against NEW YORK TELEPHONE COMPANY as to Disputed Number of Calls; that Itemized Bills Be Furnished on Request; that Complainant May Elect to Have a Coin-box Telephone Furnished

Case No. 5964

(Public Service Commission, Second District, September 11, 1917.)

Where the telephone company has endeavored to use a recording method in good faith the Commission will permit the matter to rest for a longer time until the proper solution presents itself.

The New York Telephone Company sends to its subscribers an unitemized monthly bill for local calls within New York city. The question herein is whether such bills are reasonably correct in their totals. In the present case Dr. Tracy asks either that the telephone company be required hereafter to submit itemized bills showing all details, or that the company install a coin-box or prepayment telephone in place of the

ordinary form of instrument that is furnished to private telephone subscribers. After discussing at some length the proposition advanced by the petitioner the Commission decided that under all the facts and circumstances the telephone company has always tried to avail itself of the best appliances to be had, and its failure to afford entire satisfaction in the matter of showing the correctness of charges is because of the defects in existing registering. For this reason the Commission decides to allow the whole matter to rest where it is for a while longer until some better solution than any which has yet been proposed presents itself.

EMMET, Commissioner.— The question whether the unitemized monthly bills which the New York Telephone Company sends to its subscribers in New York city for local telephone calls are reasonably correct in their totals was inquired into rather carefully by the Public Service Commission of the Second District nearly two years ago, in connection with the complaint of Leo E. Ostro against the New York Telephone Company. In that case, as in the case at bar, the accuracy of the telephone company's method of recording the number of local messages used by its subscribers was sharply challenged, and relief was sought at the hands of the Commission from what was described as essentially a one-sided and unfair system of counting these calls. Mr. Ostro asked the Commission to determine judicially that his count, rather than that of the telephone company, was correct, and in effect to render a money verdict in his favor covering the excess charges which he said had been extorted from him. Dr. Tracy's prayer for relief is somewhat different. He asks either that the telephone company be required in the future to submit itemized bills showing in detail the essential facts as to every telephone message for which a charge has been made, or as an alternative that it be ordered to install a coin-box or prepayment telephone in place of the ordinary form of instrument that is furnished to private telephone subscribers.

Although, as we have said, neither of these specific demands was made in the Ostro case, the investigation which the Commission then conducted into the entire subject necessarily involved, indirectly at least, a consideration of both of Dr. Tracy's suggested methods of dealing with the problem. That investigation satisfied the Commission that the percentage of errors occurring in the use

[Vol. 14]

Public Service Commission, Second District

of the company's message register system was very slight indeed — probably not larger than 1 per cent — and that such errors as occurred were probably due less to technical defects in the mechanism employed than to the so-called "human element" which of necessity enters to a greater or less degree into the operation of any mechanical contrivance. The Commission was quite clear, also, that it possessed no power to determine a purely money dispute between the telephone company and a subscriber. A controversy of that kind was felt to be entirely a matter for the courts to pass upon. An order was accordingly entered denying Mr. Ostro's prayer for relief, and this was accompanied by a memorandum explanatory of the Commission's views upon the main point at issue — the accuracy of the present method of counting calls. But the public irritation which has long existed in regard to this subject seems never to have died down entirely. Informally and by correspondence the question has been brought to the Commission's attention very frequently since the Ostro case was decided, and we have it before us now, in Dr. Tracy's matter, in a very concrete form indeed.

Under the circumstances we do not feel, merely because we passed two years ago on some of the questions involved in Dr. Tracy's case, that the whole matter should now be dismissed as *res judicata* on the strength of conclusions we then came to in regard to the Ostro controversy. The very large number of people who have in the interval been writing to the Commission on the subject seem to be entitled — particularly when we consider the time which has elapsed since the Ostro decision and the somewhat different angle from which the problem is now presented to us — to ask that we shall give renewed consideration at this time to the entire question which was only partially before us in the earlier proceeding. At least our previous investigation should be brought absolutely down to date. The two constructive suggestions for relief which Dr. Tracy has made should be considered upon their merits, particularly when it is remembered that from a theoretical standpoint the complainant in this case must be regarded as absolutely correct in the position he has taken upon the main question involved.

For it ought to go without saying, we should think, that the purchaser of any ordinary commodity, who has been in the habit of receiving bills for his purchases at the end of each month, is entitled as a matter of course to itemized bills which he can compare with his own record of purchases during the period in question. Only when it appears beyond peradventure that some overwhelming practical objection stands in the way of following what must be conceded to be the proper practice in such cases should this Commission countenance a refusal by any company under its jurisdiction to furnish its customers with itemized bills on demand.

After a very careful consideration of the entire subject, we feel that this is one of the situations where an exception ought to be made to the usual rule, and that the public interest not only would not be well served, but, on the contrary, that it would be affected very injuriously indeed, if itemized monthly bills to New York telephone subscribers were to be insisted on by this Commission. But the public is certainly entitled to a fairly explicit statement of the Commission's reasons for coming to this conclusion.

We shall first deal with Dr. Tracy's primary suggestion of relief: that hereafter monthly bills be submitted in itemized form. We have inquired into what the adoption of this plan would entail in the way of changes in the present business methods of the New York Telephone Company. The results of this inquiry seem interesting enough, and material enough to the question at issue, to warrant our setting them forth briefly in this memorandum. We find that it would be necessary, if itemized monthly bills are to be rendered to every telephone subscriber in New York city, for each telephone operator to write out, at the time a call is received, a separate ticket showing the call number of the station where the message originated, the subscriber's station, and the number which was called. This would be in substitution for the very simple thing which the operator now has to do, of recording each message by merely pressing an electric button connected with the recording machine as soon as a call has been completed. It goes without saying that the performance of this additional labor in connection with every telephone call would create an enormous new burden in

handling the vast telephone business in New York city and place a drag upon the service that would be intolerable to most telephone users. There are now about 240,000 message rate subscribers in the city. These message rate subscribers send about 2,500,000 calls per working day, or about 775,000,000 calls a year. One of the first consequences of the change in method would be that the number of operators at the switchboards would have to be tremendously increased. This would necessarily be so, since the number of calls which each operator can now handle would of course be much reduced under the new conditions. Larger switchboards would have to be installed if more operators were to be stationed at them. This would mean that larger buildings would have to be employed in order to house the switchboards. After the tickets had been made out by the operators, they would all have to go to some sort of accounting center, there to be sorted according to the numbers where the calls had originated. It would be necessary then to send them to another billing department in order that clerks might prepare lists each month of the numbers called by each particular subscriber. An average of 270 numbers each month would have to be listed in this manner to each of the 240,000 message rate subscribers in the city of New York. Some of these subscribers use more than 25,000 messages a month. It is significant that from these large subscribers no complaint against the existing practice has ever been received by the Commission so far as we have been able to ascertain from an examination of our records.

From all of which it must appear pretty plainly to any one who gives the subject a moment's consideration, that if the New York Telephone Company should ever be required to establish a system of this kind for the purpose of satisfying subscribers that they are not being overcharged for excess calls, it could only be done by increasing its operating expense to an extent which, while not susceptible of exact estimate, would necessarily be staggering in the grand totals to which it might go. In the long run the telephone-using public would of course have to pay for this in increased rates. There can be no escape from this conclusion. Any sub-

stantial increase in operating cost, any extravagance in operation by a public utility company, must in the end reflect itself in rates and become a burden upon the public at large. And the changes here suggested would be an extravagance pure and simple, because there is very little possibility, so far as we can see, that disputes between subscribers and the company over the number of calls used would be lessened in any substantial degree by what is now being proposed. Indeed, there is a strong probability that many more mistakes in message counts would be made under the new system than under the old. We feel that this would probably be so because our recent investigation has only confirmed us in the view expressed in the opinion in the Ostro case, which was, that the mechanical arrangement used by the telephone company in keeping count of calls is as nearly perfect as any mechanical contrivance designed for such a purpose can be made at the present time. We believe, therefore, that to the extent that this admirable mechanism is being depended upon to keep an absolutely accurate record of calls, the interest of the general public is now well safeguarded. Such mistakes as occur are mostly to be traced, as we have said, to carelessness on the part of operators and employees and not to defects in the electrical counting device by means of which the company's record of calls is kept. And mistakes of this kind would necessarily continue to be made under any registering system which depended entirely on the accuracy of the people operating it. To discard the present electrical device entirely would, in the opinion of the Commission, increase rather than decrease the total number of errors made.

For these reasons we think that the public interest would not really be served at all if we required the telephone company to install, at vast expense, a counting system comprehensive enough to supply each subscriber at the end of each month with an itemized bill. On the contrary, we think such a requirement (involving, as we have said, a probable increase in the cost of telephone service as well as in the number of mistakes that are made) would be more likely to appear ultimately as an imposition upon the people of the city than as a benefit conferred upon them.

The suggestion that coin-box or prepayment telephones shall hereafter be used in place of the ordinary type of instrument furnished to private subscribers remains to be considered. Coin-box telephones are, of course, available at present for so-called public and semi-public stations. Their use has been limited for reasons which we shall presently mention. But doctors' offices are among the places in which, under the present rules, a coin-box telephone may be installed, and the company has offered to furnish Dr. Tracy with one of these instruments under its customary form of contract for such service. Dr. Tracy has been unwilling as yet to accept it upon these terms. He insists that it be given him upon the conditions applicable to ordinary instruments installed in private stations. The Commission does not believe that the general installation of prepayment telephones would be desirable in a city like New York. The information which we have on the subject leads us to think that if this practice were followed to any considerable extent it would result in a very general slowing-up in the operation of the telephone system. When coin-box or prepayment instruments are used, the operator in registering a local call must either deposit the coin or return it to the subscriber if the wrong number is obtained. In the case of toll calls, the operation is somewhat more complicated. There the operator has to return the original coin deposited and collect the proper toll charge. This is further complicated if there should happen to be an overtime charge on a toll message. It would necessarily follow, therefore, that the number of calls which an operator could properly handle, if the use of coin-boxes were general, would fall considerably below the results that are now attained with the ordinary type of telephone. The switchboard, under the new arrangement, would have to be larger than it is at present in order to serve as many coin-box telephones as it now serves instruments of the usual type. The coin-box telephone is more expensive, and involves more equipment on the switchboards than is the case with ordinary instruments. There would be an added expense for interest and depreciation, therefore, in connection with their extensive use. This increased cost, as we have just pointed out in another connection, would in the long run have to

be borne by the telephone-using public. On account of the delicate type of the coin-box apparatus, the cost of maintenance would also be heavily increased. The coin-box is more apt to get out of order than an ordinary instrument. Again, the experience of the telephone company in connection with coin-boxes shows that extension stations equipped with this type of instrument are highly unsatisfactory to most people who use them. It is easy to see why this should be so. If, while an incoming call is being answered at an extension station, another person goes to the main coin-box station, deposits money in it, and finds that the line is in use, he must either lose the money he has dropped into the slot or else be subjected to the necessity of conducting an irritating negotiation with the telephone company in order to get it back. Coin-boxes will not, the Commission is reliably informed, work successfully on party lines, for the same reason that has been mentioned in connection with extension stations. If at a time an instrument on a party line is being used by one individual, another person should seek to make coincident use of another instrument on the same line, and should deposit a coin in it, and find the line busy, the central office operator would have no way of knowing that the line was busy. When she deposited the coin of the first person using the line, she would also deposit the other coin in the other coin-box. In the case of toll calls over party lines, there would almost certainly be a dispute in connection with practically every call. For example, ten cents might be deposited at one station, five cents at the other station, and the operator in such a case would have no way of telling which of the individuals at these two stations had contributed the ten-cent piece and which the five-cent piece. Finally, the coin-box requires that the subscriber or patron using it shall always have a coin available. No great effort of the imagination is needed to conceive of occasions upon which, under such circumstances, telephone service would be absolutely denied to people even in cases of very great emergency.

For these and for other reasons which need not now be separately mentioned, the Commission believes that aggravating as the present billing system is at times, and unsound as it may seem to be in

[Vol. 14]

Public Service Commission, Second District

theory, it had better, from the standpoint of the public — which is the only standpoint we are now considering the matter from — be allowed to stand for a while longer. The remedies proposed would on the whole be worse than the disease. To require the company to establish either a new accounting system that would be comprehensive enough to enable itemized monthly bills to be furnished to all subscribers, or as an alternative to require the installation of coin-box telephones at private stations, would in the end, we believe, bring about a less efficient form of telephone service than the public has at present and at an increased cost to the public. The problem is a complicated one, of course, and nothing would please the Commission more than to be able to do something helpful toward solving it. We fully understand and sympathize with the feelings of a man like Dr. Tracy, who thinks he knows exactly what messages have been sent over his private instrument during the course of a month, yet usually finds that his count varies considerably from that of the telephone company, and is told, when he complains of this disparity, that unless he accepts the telephone company's unitemized figures he is in danger of having his telephone service cut off. In most cases of this kind it is of course true that the telephone has been open to more or less general use by members of the subscriber's family, by his servants, and by his or their friends and visitors. That, as we understand it, is the situation in the case of Dr. Tracy's telephone. Obviously, there is always the possibility in such a case that no precautions on the part of the subscriber, however complete, will enable him to keep a record of calls that is comparable, in point of accuracy, with a record honestly kept by the telephone company. Dr. Tracy concedes that, as we understand it. Nor does he suggest that there has been any deliberate dishonesty on the part of the telephone company in keeping a record of his calls. The fault, in his opinion, lies entirely with the system; and, as he is frank enough to say, with the "human element" involved in the operation of this system rather than with the mechanism employed. But in that case, as we must again point out, the conclusion is inevitable that the trouble would increase rather than diminish

if the remedy which he suggests were applied to it — since the “human element,” with all its attendant blunders, would, under the new order of things which he suggests, be completely in control of the situation.

Enough has been said to show the utter impossibility of arriving at any entirely satisfactory solution of such a problem as we have been considering here, at the present time. The telephone users of New York city may at least rest assured that the Commission will watch the situation very closely, and of its own motion do from time to time whatever seems from the standpoint of the public to be appropriate toward correcting the conditions of which Dr. Tracy complains. New inventions may appear which will simplify the problem somewhat. Ways of increasing the efficiency of the company's working force without subjecting the general public to the burden of sustaining an extravagantly administered service may suggest themselves. The possibility of accomplishing something in these directions will constantly be borne in mind. In this connection it is proper to say, however, that so far as the Commission has been enabled to observe, the New York Telephone Company has always tried to avail itself of the best appliances that are to be had, and to maintain a high standard of efficiency in the conduct of its business. Its failure to give entire satisfaction in connection with the matter now under discussion has not, in the opinion of the Commission, been due to any desire upon the part of the company to maintain a registering method that is only partially satisfactory for one minute longer than seems necessary for the good of the system as a whole. If the Commission did not believe that this was so, it would regard the condition of which Dr. Tracy complains as intolerable, and would be willing to go to almost any length in compelling the company, at whatever cost, to rectify it immediately. Believing it to be so, it feels that this whole matter can be allowed to rest where it is for a while longer, until some better solution than any which has yet been proposed presents itself.

Commissioners Irvine and Carr concur; Chairman Van Santvoord and Commissioner Barhite not present.

In the Matter of the Application of the NEW YORK CENTRAL RAILROAD COMPANY under Section 55 of the Public Service Commissions Law for Authority to Issue 4½ Per Cent Refunding and Improvement Mortgage Bonds to the Amount of \$10,000,000

Case No. 5963

In the Matter of the Application of the NEW YORK CENTRAL RAILROAD COMPANY for Leave to Issue Its 4½ Per Cent Refunding and Improvement Mortgage Bonds, Series A, to the Amount of \$10,000,000; to Issue and Sell Its Promissory Notes, Bearing Interest at a Rate Not Exceeding 5 Per Cent Per Annum, and to Pledge, as Security for the Payment of Said Notes, Said \$10,000,000 of Bonds and Also \$10,000,000 Thereof, the Issue of Which Was Authorized by Order of the Commission Granted April 26, 1917

Case No. 6182

(Public Service Commission, Second District, September 13, 1917)

Application of New York Central Railroad Company for leave to issue certain improvement mortgage bonds and promissory notes.

The petitioning corporation, the New York Central Railroad Company, on its own application was authorized to issue to the Guaranty Trust Company of New York, as trustee, a trust agreement under date of September 15, 1917, to secure an issue of certain collateral trust gold bonds, the amount of said issue to be \$15,000,000 at face value. The New York Central Railroad Company was also granted permission to issue its promissory notes. It was also provided that if any bonds shall be redeemed from the pledge to the trustee they may be sold by the railroad company at not less than 90% of their face value and interest. In this case the net results are to be used for the purposes named in the order.

Papers filed in Case 5963:

Petition filed March 30, 1917.

Report of Division of Steam Roads dated April 30, 1917.

Hearing held April 30, 1917.

Report of Division of Capitalization dated April 20, 1917.

Order entered April 26, 1917.

Papers filed in Case 6182:

Petition filed August 28, 1917.

Hearing held September 5, 1917.

BY THE COMMISSION.—Now, therefore, upon the foregoing record, ordered as follows:

1. That the New York Central Railroad Company is hereby authorized to execute and deliver to the Guaranty Trust Company of New York, as trustee, a corporation organized and existing under the laws of the State of New York, a certain trust agreement to be dated September 15, 1917, to secure an issue of two year 5 per cent collateral trust gold notes, a copy of which indenture has been filed with the Commission herein, and that the form thereof so filed is hereby approved.

2. That upon the execution and the delivery of said trust agreement so authorized there shall be filed with this Commission a copy thereof in the form in which it was executed and delivered together with an affidavit by the president or other executive officer of the company stating that the indenture as executed and delivered is the same as that herein approved by the Commission.

3. That the New York Central Railroad Company is hereby authorized to issue \$15,000,000 face value of its two year 5 per cent collateral trust gold notes to be dated September 15, 1917, and to be secured by the aforesaid trust agreement, which notes may be sold at such price as will net the company not less than 96 per cent of their face value and accrued interest — or \$14,400,000.

4. That said notes of the face value of \$15,000,000 so authorized, or the proceeds thereof to the extent of the net amount realized from their sale, viz., \$14,400,000, shall be used solely and exclusively for the following purposes:

(a) For the discharge of outstanding promissory notes dated March 7 and April 21, 1917, aggregating \$5,000,000 and \$4,500,000 respectively, or the renewals thereof \$9,500,000

The proceeds of which were used for the purposes for which \$10,000,000 face value of bonds, or their proceeds, were authorized to be used by order in Case 5963, dated April 26, 1917.

[Vol. 14]

Public Service Commission, Second District

(b) For expenditures made and to be made as authorized in clause 3 of the order in Case 5963, dated April 26, 1917..... \$500,000

(c) For expenditures made and to be made for additions and betterments as shown in an exhibit filed with the papers in this proceeding as follows:

1. Expenditures to June 30,	
1917	\$3,309,331 36
2. Proposed expenditures subsequent to June 30, 1917.	6,790,668 64
	<hr/>
	10,000,000
	<hr/>
	\$20,000,000
	<hr/>
Amount unprovided for.....	\$5,600,000
	<hr/>

5. That the New York Central Railroad Company is hereby authorized to issue \$10,000,000 face value of its 4½ per cent refunding and improvement mortgage bonds, series A, under a certain deed of trust or mortgage dated October 1, 1913, given to the Guaranty Trust Company of New York, as trustee.

6. That the New York Central Railroad Company is hereby authorized to pledge under the trust agreement referred to in clause 1 of this order and as collateral security for the notes aggregating \$15,000,000 herein authorized to be issued, the \$10,000,000 of bonds of series A the issue of which was authorized by order in Case 5963 dated April 26, 1917, and the \$10,000,000 of said bonds the issue of which is authorized by this order.

7. That when said bonds pledged under said trust agreement as aforesaid, or any part thereof, shall be released or redeemed from said pledge, they may be sold by the New York Central Railroad Company at such price as will net the company not less than 90 per cent of their face value and accrued interest, and the proceeds thereof to the extent of the net amount realized from their

sale, viz., \$18,000,000, shall be used solely and exclusively for the following purposes:

(a) For the payment of an equal amount of said two-year 5 per cent collateral trust gold notes, herein authorized to be issued, to the aggregate amount of \$15,000,000

(b) For the payment of the balance of expenditures remaining unprovided for by the sale of said notes and referred to in clause 4 of this order, not exceeding 5,600,000

\$20,600,000

Amount unprovided for \$2,600,000

8. That clauses 2, 3 and 5 of the order in Case 5963 dated April 26, 1917, are hereby modified so as to conform to and be consistent with the provisions of this order.

9. That the New York Central Railroad Company shall for each six months' period ending December thirty-first and June thirtieth file not more than sixty days from the end of such period a verified report showing:

(a) What securities have been sold or otherwise disposed of or bonds pledged during such period in accordance with the authority contained herein.

(b) The date of such sale or pledging.

(c) To whom such securities were sold and with whom such bonds were pledged.

(d) What proceeds were realized from such sale.

(e) The principal of each loan for which such bonds are pledged.

(f) The total face value of bonds which remain pledged as collateral security for said notes on the closing date of such period.

(g) With respect to subdivisions (a) and (d) of clause 6 of this order there shall be shown in detail the amount expended

[Vol. 14]

Public Service Commission, Second District

of the proceeds of the securities herein authorized during such period.

(h) With respect to subdivisions (b) and (c) of this order there shall be shown in detail the amount expended during such period of the proceeds of the securities herein authorized, and the account or accounts under the classification of investment in road and equipment of steam roads to which the expenditures for such purposes have been charged, giving all details of any credits to road and equipment in connection with such expenditures, together with:

1. A summary of the expenditures for such purposes during the period covered by the report.

2. A summary by the prescribed accounts showing the expenditures during such period.

In reporting under subdivision (h) of this clause, sections 1 and 2, there shall be further shown the expenditures of the proceeds of the securities herein authorized to the beginning of the period reported upon and a total showing such expenditures to the end of the period.

Such reports shall continue to be filed until all of said securities shall have been sold or disposed of and the proceeds expended in accordance with the authority contained herein, and if during any period no securities were sold or disposed of or proceeds expended, or bonds pledged, the report shall set forth such fact.

10. That the authority contained in this order to issue securities and to pledge bonds is upon the express condition that the petitioner accepts and agrees to comply in good faith with the provisions hereof and before any securities are issued or bonds pledged, pursuant hereto and within thirty days of the service hereof, the said company shall file with the Commission a satisfactory verified stipulation over the signatures of its president and secretary accepting this order with all its terms and conditions, and such order shall be void and of no force or effect until such stipulation shall have been filed as last above provided.

Finally, it is determined and stated, That in the opinion of

the Commission the money to be procured by the issue of said notes and bonds herein authorized is reasonably required for the purposes specified in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

In the Matter of the Complaint of SUBSCRIBERS IN THE TOWN OF ARGYLE, WASHINGTON COUNTY, against NEW YORK TELEPHONE COMPANY, as to Toll Charges Being Recently Imposed, and as to Service

Case No. 5900

(Public Service Commission, Second District, September 18, 1917.)

New York Telephone Company directed to do away with a discrimination against its subscribers in the town of Argyle, Washington county.

For many years prior to November 15, 1916, the telephone subscribers in the town of Argyle, Washington county, N. Y., enjoyed unlimited service in what is known as the Glens Falls district. The number of subscribers in this district on January 1, 1916, was 4802. On November 15, 1916, the telephone company segregated the Argyle subscribers into a theoretical central office district known as the Argyle district, the telephone exchange being located in the village of Fort Edward, and the service to the Argyle subscribers was thereafter limited to the subscribers on the Fort Edward exchange, numbering at that time about 432 exclusive of those in the town of Argyle, and required the subscribers in Argyle to pay toll charges on calls to other stations in the Glens Falls district. No other subscribers on the Fort Edward exchange were restricted in the same way as the Argyle subscribers, and none of the rural subscribers attached to the Glens Falls and Hudson Falls exchanges were restricted in their service in the Glens Falls district except that they could not communicate with stations in the Argyle district except upon the payment of toll charges. The rates of the Argyle subscribers since November 15, 1916, are the same as they were for the more extensive service prior to that date, and the rates charged other rural subscribers on the Fort Edward, Glens Falls, and Hudson Falls exchanges are the same as the rates paid by the Argyle subscribers both before and since November 15, 1916.

Held, that upon the record in this case there is a discrimination against the telephone subscribers in the town of Argyle, and that such discrimination should be promptly removed by the telephone company.

[Vol. 14]

Public Service Commission, Second District

Rogers & Sawyer (by Erskine C. Rogers) for complainants.

Frankland Briggs for respondent.

Daniel F. Imrie for Chamber of Commerce of the City of Glens Falls.

Hearings in the present matter were held at the court house in the village of Hudson Falls March 30, April 13, and May 4, 1917, and subsequently the Commission acted in conformity to the opinion submitted by

CARR, Commissioner.— The complaint in this case was filed on February 14, 1917, and the answer was filed on March 9, 1917. The complaint was signed by about 154 telephone subscribers in Argyle, Smith's Basin, Fort Edward, Hudson Falls, and South Glens Falls. The cause of the complaint was the action taken by the telephone company in November, 1916, in establishing the Argyle central office district, thereby restricting the area in which the Argyle subscribers formerly had unlimited service, and putting into effect a new tariff requiring these subscribers to pay toll charges on calls to Hudson Falls and Glens Falls. They claim that this restriction of service and the exaction of toll charges are unreasonable and unjust, contrary to public convenience, and that it subjects all of these localities to undue and unreasonable prejudice and disadvantage and are unjustly discriminating and unduly preferential. They ask the Commission to require the telephone company to restore to its subscribers in the town of Argyle and elsewhere in the Glens Falls district the unlimited service which they had prior to November 15, 1916. The answer of the respondent denies many of the material allegations, and asserts that the change in the method of operation which is complained of is fully justified and that it was made only after very carefully considering the entire situation and with a view to giving fair and equitable rates to the subscribers in Argyle; and further, that the operations in that town have not been remunerative to the company and that the rates complained of are fair and reasonable.

The subject of the complaint was gone into exhaustively, and it developed that the principal grievance of the Argyle subscribers was the restriction of the area within which they might have service without the payment of a toll charge, and the discrimination against them by the telephone company in favor of adjacent rural communities having connection with the three central offices in the Glens Falls district, although there was some criticism made regarding the service of the company in the town of Argyle. There was some justification for the complaint regarding the service because the evidence shows that some of the lines were considerably overloaded, but it also appeared that the company was endeavoring to rectify these conditions so that the people in the town of Argyle may have reasonably good party-line service. There were twelve witnesses who testified in behalf of the complainants, most of whom were subscribers in the town of Argyle. There were also a large number of people from the town of Argyle in attendance at the hearings. Summarizing the testimony of all these witnesses, it may fairly be stated that there is no substantial complaint with regard to the service, and that there is no objection to paying a reasonable amount for such service, but there is a firm belief that the town of Argyle is being discriminated against by the telephone company when it exacts a toll charge from subscribers in the town who desire to communicate with subscribers on the Hudson Falls and Glens Falls exchanges. Some of the witnesses stated that since the exaction of the toll charge from Argyle, the farmers in the town have driven in to Glens Falls with their teams rather than telephone and pay a toll charge.

It seems that the telephone service was originally installed in the town of Argyle by the Commercial Union Telephone Company, which was a competitor of the Hudson River Telephone Company in the telephone area comprising Glens Falls, Hudson Falls, and Fort Edward, and which has for many years been known as the Glens Falls district. It also embraces numerous small hamlets and villages. Telephone subscribers in this entire area or district have heretofore had the privilege of telephoning to any station

[Vol. 14]

Public Service Commission, Second District

therein without payment of a toll charge. When the Commercial Company began its development in the town of Argyle, it promised subscribers that there would be no toll charge for communications to subscribers in Hudson Falls and Glens Falls. The original charge for residence telephones in the town by this company was one dollar and fifty cents per month. The Commercial Union Company continued in business for a number of years, and about the year 1905 a competing line was put up in the town by the Hudson River Telephone Company, the predecessor of the New York Telephone Company in this particular section of the State. Some of the subscribers of the Commercial Company also subscribed to the service of the Hudson River Company. The same charges were made for service by each company, and the Hudson River Company when it entered into this field also gave unlimited service to Argyle subscribers throughout the Glens Falls district. These companies continued in competition for several years, and the Commercial Company was finally absorbed by the Hudson River Company, which was in turn taken over by the respondent. So it appears that for a considerable period of time the subscribers in Argyle were accustomed to and did have service on flat rates throughout the entire Glens Falls district without the exaction of toll charges, and when this practice was interrupted by the telephone company on November 15, 1916, it caused a great deal of dissatisfaction among the subscribers in Argyle. The charge for residence telephones in the town of Argyle was then and still is eighteen dollars per annum, and for business telephones twenty-four dollars. On that date a new tariff was put in operation by the telephone company, and the service to Argyle subscribers was restricted to the Fort Edward central office district and toll charges were put into effect as follows:

Calls from Argyle central office district to	2-number calls	Particular person calls
Hudson Falls	5 cents	10 cents
Glens Falls	10 cents	15 cents

In order to accomplish this result the subscribers in the town of Argyle were put into what is called the "Argyle Central Office

District," but inasmuch as there is no central office in the town of Argyle, this is what is known in telephone parlance as a "theoretical district," the central office serving this community being located at Fort Edward now just as it always has been. The population of the town of Argyle is about 1,600, and it includes the village of Argyle with about 223 inhabitants, the hamlet of North Argyle, and other small communities, together with a large number of farms. The principal markets for the farmers of Argyle are Glens Falls and Hudson Falls. Fort Edward is about six miles from the village of Argyle, two miles from Hudson Falls, and five miles from Glens Falls, the population of the latter, which is in Warren county, being about 15,000; that of Hudson Falls and Fort Edward being about 6,000 and 3,500 respectively. Fort Miller is located in the town of Fort Edward, and is farther from the village of Fort Edward than is the village of Argyle, and yet telephone subscribers in Fort Miller are permitted to talk with subscribers in Glens Falls and Fort Edward without the payment of a toll charge. And the same is true of subscribers in Adamsville, Smith's Basin, and Kingsbury, each of which places is about six miles east of Hudson Falls; and of South Hartford, which is twelve miles from Hudson Falls and fifteen miles from Glens Falls.

At the close of complainants' case, the counsel for the telephone company made a motion to dismiss the complaint on the ground that the complainants had failed to substantiate their allegations that the rates of the respondent are unjust and unreasonable. This point was undoubtedly well taken if the complaint rested entirely on the question of whether or not the rates were reasonable or unreasonable under the decision in *People ex rel. New York Telephone Co. v. P. S. C. Second District*, 169 App. Div. 448, but inasmuch as it was apparent that the complainants had made a *prima facie* case in respect to the question of discrimination, the motion was denied. Counsel for the respondent did not renew his motion at the close of the entire case, so that we have assumed that the case is to be decided on the merits.

While the respondent went into the matter of earnings in the

Argyle area to a considerable extent for the purpose of showing that this particular business might not be paying a fair return on the investment, yet we do not think this is the important question to be decided at this time. It may be true that the subscribers in Argyle do not pay sufficiently high rates, and that the practice of imposing a toll charge on subscribers in the Hudson Falls and Glens Falls exchanges may be justified, yet there is a fertile field for discussion as to the proper method of determining the rates to be charged in these rural districts, and the subject is one which is so broad and complicated that we prefer to dispose of this particular case entirely on the question of discrimination.

The principal witness for the respondent was its chief commercial engineer, Mr. A. D. Welch. In the course of his testimony he endeavored to show why the Argyle district was receiving extremely favorable terms from the telephone company and why the toll charges complained of were justified. It is not necessary to go into these reasons extensively, but we think it desirable to point out one example used by Mr. Welch to show how the telephone company attempts to justify what we consider a discrimination against Argyle. An arc was drawn using Hudson Falls as a center, with a radius extending to a point taking in the hamlet of Kingsbury, and the area inside of this arc took in Glens Falls and nearby territory and the village of Fort Edward, and a substantial portion of the town of Fort Edward, but it excluded the greater portion of the subscribers in the town of Argyle. The radius of this arc was five and one-half miles. Another arc was drawn using Glens Falls as a center, and taking in the hamlet of Kingsbury, and the area within this arc included the village of Hudson Falls and a substantial portion of the town of Kingsbury, but excluded Smith's Basin in that town. It also included the village of Fort Edward and a substantial portion of the town of Fort Edward, but excluded practically all of the telephone subscribers in the town of Argyle. The radius of this arc was seven and one-quarter miles. The purpose of this demonstration was to show that all of the subscribers within the areas inside of these

arcs were entitled to unrestricted service throughout the Glens Falls area, whereas the Argyle subscribers, being outside of these limits, ought properly to pay toll charges for the service which they might require from the Hudson Falls and Glens Falls exchanges. However, Mr. Welch did not draw an arc using the village of Fort Edward as a center, for the purpose of showing what the result would have been as regards the village of Argyle in relation to other rural communities in the Glens Falls district. If such an arc had been drawn, with a radius of only five and three-quarters miles, it would have included practically all of the village of Argyle and a considerable number of subscribers in the town, the village of Hudson Falls, and the city of Glens Falls, but would have excluded Kingsbury, Smith's Basin, West Fort Ann, Adamsville, North Argyle, South Hartford, Fort Miller, and Gansevoort. We merely cite this because it does not seem to us as though the drawing of arcs in this way is of much real assistance in reaching a determination as to the amount of territory in which a subscriber should have flat-rate service. Why telephone subscribers in Fort Miller, eight miles south of Fort Edward, should have unrestricted service throughout the entire Glens Falls district; and Gansevoort, which is about the same distance south of Glens Falls; and Kingsbury and Smith's Basin, which are six or more miles from Hudson Falls; and other subscribers in the towns of Kingsbury, Hartford, Moreau, and Northumberland, should have similar service without the imposition of toll charges; and the town of Argyle should be segregated into a separate district and made to pay a toll charge for communication with subscribers on the Hudson Falls and Glens Falls exchanges has not been explained to our satisfaction. There is an explanation with respect to some of the subscribers in the town of Hartford who are receiving service under contracts which do not expire for a number of years; these subscribers are on what is known as a "service line basis," having built their pole line, including the circuit, and also furnished their own telephone instruments and put them in. They also did their own wiring, and maintain that much of the plant used in the telephone service. Their lines are taken into the Hudson Falls

exchange from a terminus owned by the telephone company. This arrangement was made when these subscribers first took service from the Commercial Union Telephone Company, and they are charged a certain fixed price per annum on these contracts which do not expire until 1925. There are a few similar subscribers in the town of Kingsbury, and two in the northern part of the town of Argyle, that pay no toll charge to Glens Falls or Fort Edward. When the Commercial Union Telephone Company was taken over by the Hudson River Telephone Company, these contracts were assumed by the last named company. This arrangement, however, only applies to a very small percentage of the subscribers in the Glens Falls district.

While the respondent presented numerous compilations to show that areas similar to Argyle do not furnish sufficient revenue on the present rates to provide a fair return on the investment, yet it seems unnecessary at this time to go into this matter exhaustively. The record shows that there is a good percentage of development in the Glens Falls area, the average number of stations in the year 1916 being 4,936; and prior to November, 1916, the Glens Falls district was the largest local service area in the territory of the New York Telephone Company where the minimum rate is eighteen dollars per station. The company recognizes its duty to provide service in the small cities and villages and towns, as well as in the rural sections, on a basis which will enable the people to obtain telephone service and also permit the business to be developed, and it is not expected that there will be any substantial revenue derived out of a district like this one so as to provide more than a minimum return on the investment, although this condition may change in future years. The position of the respondent is that communities like this ought to pay what they reasonably can so that they will not be a burden on the cities where the telephone business is more highly developed. The area of the Fort Edward calling district before November, 1916, was 246 square miles, which includes the territory tributary to the Glens Falls and Hudson Falls exchanges. A test was made for five days in July, 1915, to show the terminating points of the calls originating

in the Argyle district; this showed that there was sufficient traffic to Fort Edward to make it inadvisable to establish a toll charge to that point. The amount of traffic to Hudson Falls and Glens Falls, which aggregated $18\frac{1}{2}$ per cent of the total, seemed to warrant the introduction of standard toll charges to those points. It was therefore determined to establish the Argyle central office district and to make toll charges for calls to the Hudson Falls and Glens Falls exchanges. It was assumed that this revenue would enable the company to make such plant extensions as might be required in the Argyle area, and it was as a result of this study that the toll charges were put into operation as of November 15, 1916. When this toll charge was put into effect there were 143 stations in the Argyle district; 11 subscribers discontinued their service, but since that time new stations have been added, until on April fifteenth of the present year there were 145 stations in the Argyle district. As showing the toll calls from the Argyle district to Glens Falls and Hudson Falls, and the amount derived from such toll calls, the respondent introduced in evidence exhibits Nos. 5 and 6, as follows:

[Vol. 14]

Public Service Commission, Second District

TOLL TRAFFIC RECORD, BY CALLS

Statement Showing the Monthly O. K. Toll Calls Between Argyle and Hudson Falls and Glens Falls, Both Ways

	November, 1916 (15th to 30th inc.)			December, 1916			January, 1917			February, 1917			March, 1917		
	2-No.	P. P.	Total	2-No.	P. P.	Total	2-No.	P. P.	Total	2-No.	P. P.	Total	2-No.	P. P.	Total
Argyle to Hudson Falls.....	115	1	116	216	2	218	156	2	160	156	2	158	166	3	169
Hudson Falls to Argyle.....	149	0	149	242	0	242	190	0	190	179	2	181	246	3	249
Argyle to Glens Falls.....	122	1	123	153	2	155	199	6	205	105	4	109	106	1	107
Glens Falls to Argyle.....	101	1	102	137	5	142	169	0	169	127	4	131	127	3	130

	Average per month for 4.5-month period		
	2-No.	P. P.	Total
Argyle to Hudson Falls.....	180.2	2.2	182.44
Hudson Falls to Argyle.....	223.6	1.1	224.7
Argyle to Glens Falls.....	152.2	3.1	155.33
Glens Falls to Argyle.....	146.9	2.9	149.8

TOLL REVENUE ON BASIS OF RATE FOR INITIAL PERIOD

Statement Showing the Approximate Revenue from Monthly O. K. Toll Calls Between Argyle and Hudson Falls and Glens Falls, Both Ways

	November, 1916 (15th to 30th inc.)	December, 1916	January, 1917	February, 1917	March, 1917	Total	Average per month for 4.5-month period
Argyle to Hudson Falls	\$5 85	\$11 00	\$8 10	\$8 00	\$8 60	\$41 55	\$9 233
Hudson Falls to Argyle	7 45	12 10	9 50	9 15	12 60	50 80	11 29
Argyle to Glens Falls	12 35	15 60	20 80	11 10	10 75	70 60	15 69
Glens Falls to Argyle	10 25	14 45	16 90	13 30	13 15	68 05	15 111
Total	\$35 90	\$53 15	\$55 30	\$41 55	\$45 10	\$231 00	\$51 333

[Vol. 14]

Public Service Commission, Second District

These are here referred to for the purpose of showing that the revenue derived from such toll business is not extensive. The station development in the Fort Edward, Glens Falls, Hudson Falls, and Argyle central office districts is set forth in respondent's exhibit No. 10, as follows:

STATEMENT OF STATION DEVELOPMENT, BY CENTRAL OFFICE
DISTRICTS
(Bell Company only)

	Argyle *	Fort Edward *	Glens Falls	Hudson Falls
January 1, 1910.....		301	1,610	433
January 1, 1911.....		300	1,821	482
January 1, 1912.....		363	2,145	575
January 1, 1913.....		422	2,339	643
January 1, 1914 †.....		575	3,142	496
January 1, 1915.....		565	3,222	881
January 1, 1916.....		555	3,236	1,019
January 1, 1917.....	133	432	3,415	1,089
March 1, 1917.....	143	436	3,457	1,102

* Argyle stations included in figures for Fort Edward until November 15, 1916.

† Consolidation with Commercial Union Telephone Company December 12, 1913.

We believe that attention should be directed to this exhibit, as we consider it significant in view of the determination which we propose to make in this case. It will be noted that the number of stations in the so-called Glens Falls district was 2,344 on January 1, 1910, and 4,802 on January 1, 1916. Including Argyle in the same district as of January 1, 1917, and March 1, 1917, there were 5,069 and 5,138 stations respectively. However, the Argyle subscribers on January 1 and March 1, 1917, were only given service on a flat-rate basis to subscribers on the Fort Edward exchange. On those dates the number of subscribers in these two districts aggregated 565 and 579 respectively. Notwithstanding the segregation of the Argyle subscribers into the Argyle central office district, no reduction was made in the rates formerly charged the Argyle subscribers, so that while they had on January 1, 1916, unlimited service to a district or area comprised of 4,802 subscribers, yet after the imposition of the toll charges they were restricted to service at the old rates to the number of subscribers

hereinbefore mentioned, viz., 565 as of January 1, 1917, and 579 as of March 1, 1917. It does not seem to require much argument to sustain the contention of the complainants that the service given Argyle subscribers has been most materially diminished by the rearrangement made by the telephone company, and it may probably be fairly assumed that the service to the subscribers was very much diminished in value by the change which was made. We are not discussing now the merits of the rates which were charged Argyle subscribers in and of themselves, but rather in relation to the rates charged to similar subscribers in adjacent areas. While the Argyle subscribers are confined to the Fort Edward area, and pay toll to the Hudson Falls and Glens Falls areas, yet rural subscribers in the Glens Falls area and Hudson Falls area can talk to the Fort Edward area exclusive of Argyle without the payment of toll charges. The rural districts appurtenant to Hudson Falls and Glens Falls have access to the Glens Falls and Hudson Falls markets without the payment of toll, and many of these rural subscribers are considerably farther away from their respective exchanges than Argyle is from Fort Edward. The Commission is of the opinion that these facts conclusively demonstrate that there is a discrimination against the Argyle subscribers. Just why the rural subscribers in Argyle attached to the Fort Edward exchange are treated differently from other subscribers of the same class attached to the other exchanges in the same district has not been explained to the satisfaction of the Commission. There would seem to be no good reason why the Argyle subscribers should be deprived of the privileges enjoyed by other rural subscribers who obtain their service from either the Hudson Falls or Glens Falls or Fort Edward exchanges, and we believe it is a situation which should be remedied. We are convinced from the records in this case that residents in the town of Argyle who are telephone subscribers, and who make use of the telephone service for handling their farm products in the city and villages mentioned, are placed at a considerable disadvantage with other subscribers who use the telephone for the same purpose in the rural districts adjacent to Hudson Falls and Glens Falls; and the record shows that this is

[Vol. 14]

Public Service Commission, Second District

the substantial cause of complaint in this case. If all of this particular class of subscribers were treated alike, we are inclined to believe that much of the cause for complaint would be removed. Some of the witnesses testified that if the telephone company were entitled to more revenue from the Argyle district, they would prefer to pay higher rates and still have the privilege of talking with subscribers in the Glens Falls and Hudson Falls districts without the imposition of toll charges. If the telephone company, after a further study of the matter, is still convinced that the present toll charge which is exacted from Argyle subscribers is justified, then we think the same class of subscribers in the Hudson Falls area and Glens Falls area should be similarly treated. However, the discrimination must be removed. It may possibly be that the matter might be worked out fairly to all concerned by requiring rural subscribers to pay a charge of five cents for every call through each central office other than the one to which the subscriber's station is attached. In that way rural subscribers in the Hudson Falls area would pay five cents for a two-number call to Glens Falls and the same to Fort Edward. The Fort Edward subscribers would pay five cents for a call in the Hudson Falls area and ten cents for a call in the Glens Falls area, and Glens Falls subscribers would pay five cents to the Hudson Falls area and ten cents to the Fort Edward area. We are not suggesting that this arrangement be made, but it may be that a plan along those lines would work out equitably if the telephone company can show that it is entitled to additional revenue in the so-called Glens Falls district, and that such an arrangement would be more equitable than an adjustment of rates along some other line. The telephone company should therefore promptly remove the discrimination against the Argyle subscribers, and an order to that effect will be entered forthwith.

All concur.

In the Matter of the Petition of the LONG ISLAND RAILROAD COMPANY under Sections 53 of the Public Service Commissions Law and 89 of the Railroad Law as to the Construction of a New Connecting Track between the Montauk Division and the Manorville Branch and as to the Crossing of the South Country Road Highway by Said Proposed Track

Case No. 6190

(Public Service Commission, Second District, September 19, 1917)

The manner in which a new track of the petitioning company shall cross the public highway, also permission to use a franchise for such crossing.

The Long Island Railroad Company asked for a determination as to how a new track of its railroad connecting the Montauk Division with the Manorville branch should cross the South Country Road highway. It also sought permission to exercise a franchise (granted by the Supreme Court under section 21 of the Railroad Law) permitting such crossing. The authority sought for was granted as to the building of the connecting line and as to the franchise granted to such company by the said order of the Supreme Court dated September 17, 1917.

BY THE COMMISSION.—A petition under section 89 of the Railroad Law and section 53 of the Public Service Commissions Law having been filed with this Commission by the Long Island Railroad Company for a determination as to the manner in which a new track of its railroad connecting the Montauk division and the Manorville branch a short distance west of Eastport station proposed to be constructed shall cross the South Country Road highway and for permission to exercise a franchise (when granted by the Supreme Court under section 21 of the Railroad Law) permitting said crossing; and a public hearing on said petition after due notice having been held in the city of New York on September 14, 1917, at which L. J. Carruthers appeared for the petitioner, Joseph T. Losee appeared for the town of Brookhaven, F. A. Hermans appeared for the State Commissioner of Highways, Peter Nostrand appeared for the county of Suffolk, and Riley P.

[Vol. 14]

Public Service Commission, Second District

Howell and Clarence E. Dare also appeared for the town of Brookhaven; at which hearing the town and county authorities and the State Commissioner of Highways desired and the Long Island Railroad Company agreed that the proposed new connecting track should be built over the grade of the South Country Road (said road being a part of the State highway system) and, on account of the establishment of the United States Training Camp, known as Camp Upton, it having been shown that this proposed connecting track should be constructed immediately and with the greatest possible speed, thus making a permanent construction of the crossing at the present time impossible, and all parties having agreed to accept a temporary construction, which the railroad promised to replace at some future date at its own cost and expense with a permanent structure; and there being no objection to the granting of the petition, it is

Ordered, That this Commission hereby determines under section 89 of the Railroad Law that the new connecting track of the Long Island railroad proposed to be constructed between the Montauk division and the Manorville branch shall cross over the grade of the South Country Road highway upon a timber structure approximately nine feet above the present road surface and that the highway be depressed by the construction of an approach grade on the west side of the proposed intersection, descending easterly at the rate of 5 per cent a distance of approximately 400 feet, so as to provide a headroom of not less than 12 feet, from which point it shall continue to descend in an easterly direction at the rate of about 0.5 per cent to an intersection with the present road surface.

The timber structure to be erected by the railroad company shall provide two openings, each not less than twelve feet in width, for the purpose of accommodating the highway traffic. The highway at the crossing and upon the approaches shall be surfaced with cinders which the railroad company has agreed to supply.

The approaches to the proposed crossing shall be graded to a width of approximately twenty-six feet between center lines of side ditches.

This order is made upon the condition, agreed to by the railroad

company, that no part of the cost of the construction work herein provided for shall be chargeable to, be payable or paid by the town of Brookhaven, in which said proposed crossing is located, or the State of New York, and that the entire expense shall be borne by the Long Island Railroad Company.

This order is made upon the further condition that upon the improvement of this highway by the State Commissioner of Highways the structure herein provided for shall be removed and a permanent structure provided in accordance with plans to be approved by that Department and this Commission. The cost of such permanent structure together with all incidental land and damage costs, if any, shall be paid by the Long Island Railroad Company, and no part thereof charged upon either the town of Brookhaven, the county of Suffolk or the State of New York.

The location of the proposed crossing and the alignment of the connecting track are shown upon a map on file with this Commission, said map being entitled "L. I. R. R. Plan of 'Wye' at Eastport Connecting Montauk Div. & Manor Br."

It is further ordered, That this Commission under section 53, Public Service Commissions Law, hereby permits and approves the construction of this connecting branch of the Long Island railroad from a point on the Montauk division of said railroad at Eastport to a point on the Manor branch of said railroad, a distance of about 2,000 feet, and hereby permits and approves the exercise by the Long Island Railroad Company of a franchise or right granted it by an order of Mr. Justice Van Sieten of the Supreme Court dated September 17, 1917, to construct said connecting branch railroad across the South Country Road highway at Eastport, in the town of Brookhaven, Suffolk county.

Petition of JORDAN ELECTRIC LIGHT AND POWER COMPANY, under Section 68, Public Service Commissions Law, for Permission to Construct and Approval of Franchise in Municipalities of Onondaga County

Case No. 6180

(Public Service Commission, Second District, October 4, 1917)

Application by an electric light and power company to secure the permission of the Commission to exercise its present franchise.

For a number of years the Jordan Electric Light and Power Company has been furnishing electricity in the incorporated villages of Jordan and Elbridge and in a portion of the town of Elbridge in Onondaga county. When the present management of the company went into office it discovered that its operation in the village and town of Elbridge had not been supported by any franchise, at least not by any formal franchise. In order to conform to the law the company makes the present application, under section 68 of the Public Service Commissions Law, for permission to construct its system and approval of several local franchises. Permission granted.

BY THE COMMISSION.—The Jordan Electric Light and Power Company now furnishes electricity in the incorporated villages of Jordan and Elbridge and in a portion of the town of Elbridge in Onondaga county. The present management of the company discovers that the operation in the village and town of Elbridge, while it has continued for a number of years, has not been supported by any franchise, at least not by any formal franchise. The company desires to bring itself into strict conformity to the law in respect of its operation. It also desires to furnish electricity in the hamlet of Hart Lot or Skaneateles Junction; also to furnish electricity in and about the hamlet of Warner, which lies partly in the town of Camillus and partly in the town of Van Buren. In order to accomplish these objects the petitioner asks, under section 68 of the Public Service Commissions Law, permission to construct its system and approval of several franchises therefor. These franchises are as follows:

1. Franchise granted by the village of Elbridge to F. W. Knapp, the president of the petitioner, and by him transferred to the petitioner, authorizing the erection and maintenance of poles, wires and fixtures on all the streets, highways and other necessary and proper points within the corporate limits of the village.

2. Franchise granted by the town of Elbridge to said Knapp and by him transferred to the petitioner, covering all highways of that part of the town within a radius of one-half mile of the New York Central railroad station known as Skaneateles Junction, and outside of that radius along certain designated highways.

3. Franchise granted by the town of Camillus to the petitioner covering any highways within a radius of one-half mile of the New York Central railroad bridge located in the town of Van Buren in the settlement of Warner and outside of such territory in an easterly direction to include the property of the Onondaga Vitrified Brick Company and the highway or highways leading thereto.

4. Franchise from the town of Van Buren to the petitioner covering any highway in said town within a radius of one-half mile of the New York Central railroad bridge located in the town of Van Buren in the settlement of Warner and outside of such territory in an easterly direction to include the property of the Onondaga Vitrified Brick Company and highways leading thereto.

Copies of said franchises are attached to the petition herein.

A public hearing was held in the city of Syracuse, September 29, 1917, at which the petitioner appeared and there were also appearances on behalf of the Syracuse Lighting Company and the town board of Van Buren. Neither the lighting company nor the town opposed the application.

It is determined and stated that the construction of said plants and the exercise of said franchises are necessary and convenient for the public service and it is ordered

1. That the permission and approval of the Commission be given to the Jordan Electric Light and Power Company, under section 68 of the Public Service Commissions Law, to construct, maintain and operate in the village of Elbridge and in such parts

[Vol. 14]

Public Service Commission, Second District

of the towns of Elbridge, Camillus and Van Buren as are described in the several franchises above mentioned, poles, wires and any other fixtures or structures necessary for the conducting or transmission of currents of electricity upon or across the highways and other public places within the territory described in said several franchises.

2. That the permission and approval of the Commission be given to said Jordan Electric Light and Power Company to exercise the rights and privileges granted by said several franchises, subject, however, to all lawful terms and conditions thereof.

3. No poles, wires or other structures shall be placed upon, along or across any State or county highway without the consent of the State Commissioner of Highways.

Petition and Supplemental Petition of the LAWRENCE PARK HEAT, LIGHT AND POWER COMPANY under Sections 68 and 81, Public Service Commissions Law, for Permission to Construct in Portions of the Incorporated Village of Bronxville an Electric Plant and a Steam Plant, and for Approval of the Exercise of Rights and Privileges under Franchises Therefor Received from Said Village

Case No. 5739

(Public Service Commission, Second District, October 9, 1917)

Application by a heat, light and power company for permission from the Commission to construct an electric and a steam plant, and for approval of existing local franchise granted by the Bronxville village authorities.

The Lawrence Park Heat, Light and Power Company, which is entirely owned by the members of the Lawrence family in the incorporated village of Bronxville, was several years ago granted a local franchise, the company at that time furnishing light to members of that family and the occupants of certain buildings owned by the Lawrence interests. It now seeks to carry on a public lighting business. The present application is opposed by the Westchester Lighting Company, which has been engaged in business in Bronxville as a public lighting company since 1901. The franchise granted to the Lawrence Company was granted in August, 1912.

As far back as 1896, however, one of the Lawrence family built a hotel in Bronxville and installed in the basement thereof a private lighting plant. The village was, except for the Lawrence houses, entirely without electric service. In 1900 the hotel burned down, destroying this plant, and the poles and wires were then taken over temporarily by the Westchester Electric Light Company, a neighboring concern, which agreed to bring in electric current from the outside and to furnish Mr. Lawrence's houses with light. In the same year, however, this company was absorbed by the Westchester Lighting Company and since then the latter company has been the only one in Bronxville which regularly sold electricity to the general public.

Mr. Lawrence in 1904 replaced his burned hotel with a larger one and erected a separate building for his power plant, organizing a new company which is the petitioner herein. Operating entirely upon the property of the Lawrence interests no permission was necessary. In 1914, however, the company secured local permission to extend its plant and made an application to the Commission and on June 23, 1914, such permission was granted. In August, 1916, when the formal franchises were granted to the Lawrence Company by the village authorities of Bronxville, the old situation changed. *Held*, that the record shows that the Lawrence Park Light, Heat and Power Company was not established to do a public lighting business and the granting of permission to serve the public imposed upon it very great difficulty in carrying its new load as a public plant should. Moreover if competition with the Westchester Company is to be permitted in Bronxville, notwithstanding the good service now given by the latter, it would serve as a precedent in other Westchester communities. *Held*, also, that it is unnecessary at this time for the Commission to pass definitely upon the important questions of law bearing upon the validity of the Lawrence Company's franchises; that accordingly the Commission has disposed of the case entirely upon what is considered to be its merits, as distinct from its technicalities. Permission refused.

Joseph S. Wood, for petitioner.

John J. Crennan and Martin S. Decker, for the Westchester Lighting Company.

Ralph W. Gwinn, Village Attorney, for the Village of Bronxville.

EMMET, Commissioner.— This is an application by the Lawrence Park Heat, Light and Power Company, under sections 68 and 81 of the Public Service Commissions Law, for permission to

[Vol. 14]

Public Service Commission, Second District

lay mains in portions of the incorporated village of Bronxville, and to exercise its rights and privileges under what was intended to be a valid franchise granted to the company in August, 1912, by the Bronxville village authorities. The applicant corporation, owned by members of a family which has been largely instrumental in the establishment of Bronxville as a prosperous, not to say model, suburban village, has not until now attempted to do more, in the way of supplying electric light to the people of Bronxville, than to serve members of the Lawrence family and the occupants of certain buildings owned by the Lawrence interests. It has not, in other words, hitherto sought to carry on a public lighting business. Its present application is, of course, being very vigorously opposed by the Westchester Lighting Company, which has been engaged in business in Bronxville, as a public lighting company, since 1901.

Certain circumstances connected with the early history of the two companies which now appear before the Commission as rivals — and, generally, with the whole development of the electrical business in Bronxville — should at once be referred to, for the bearing they have upon the merits of the present controversy. As early as the year 1896 Mr. William V. Lawrence built the first Gramatan Inn in Bronxville. In the basement of the inn he installed a private electric lighting plant for the purpose of lighting the building and a few other nearby houses of which he was the owner. He required no franchise from the village for this purpose. He himself owned the streets of Lawrence park, upon which his houses stood. Along some of these he erected poles and wires, making no effort however to extend the system over any of the public highways in Bronxville or to serve the general public with electricity. No public lighting company had entered Bronxville up to that time. The village, generally, except for Mr. Lawrence's houses, was entirely without electric service.

In 1900 the first Gramatan Inn burned down, destroying Mr. Lawrence's electric plant entirely except for the poles and wires just spoken of. These were taken over temporarily, very shortly after the fire, by the Eastchester Electric Light Company, a neigh-

boring concern which, under a mere verbal agreement at first, undertook to bring electric current in from the outside and to look out for Mr. Lawrence's houses. In December, 1900, this company, which in the meantime had regularly entered Bronxville as a public electric light company, and had established a system of its own there and acquired some franchises from the village, was absorbed by the Westchester Lighting Company. Since then the last named corporation has been the only one in Bronxville which regularly sold electricity to the general public.

Four years after the first structure had been destroyed, in 1904, Mr. Lawrence decided to replace the old Gramatan Inn with a larger hotel. The new building was finished in the spring of 1905. At the same time Mr. Lawrence established a steam and electric plant for the purpose of heating and lighting his hotel and adjoining buildings. He placed this, not in the basement of the hotel as formerly, but in a separate building nearby. Following a well-settled policy in connection with the development of his Bronxville property, he organized a separate company known as the Lawrence Park Heat, Light and Power Company to manage this steam heating and electric installation. It was intended primarily as a steam heating plant, the electric energy developed there being but a byproduct of the steam. Again, as in the case of the first operation, no franchises or permits from the village of Bronxville were necessary. The company for a number of years made no reports to the Public Service Commission. It claimed, in fact, not to be an electrical corporation as defined by subdivision 13 of section 2 of the Public Service Commissions Law. To use its own words, it "generated and distributed electricity solely upon or through private property * * * for its own use or the use of its tenants and not for sale to others." It commenced, however, in 1912, to report to the Commission as a subsidiary company. On December 31, 1912, it was exempted by order of the Commission from making full reports and keeping separate accounts for what was described as "its subsidiary and incidental electric business." The order of the Commission permitting this exemption stated that it had been made to appear to the satisfaction of the Commission that the Lawrence Park Heat, Light and Power Company

[Vol. 14]

Public Service Commission, Second District

"is engaged in generating and distributing electric current chiefly for its own use, and that outside of current for its own use it supplies only four customers, all of whom are tenants of the Lawrence Park Realty Company, which is the owner of all the stock of the Lawrence Park Heat, Light and Power Company, and that the supply of such electric current to said tenants is subsidiary and incidental to its general business and not general in its character and is inconsiderable in amount."

So matters stood until the year 1914, when Mr. Lawrence's company sought and obtained from the village authorities permission to carry two wires across Pondfield road for the purpose of supplying a new building belonging to the Lawrence interests, known as the Colonial Building. It then became necessary to apply to the Public Service Commission for authority to exercise what was thought by some to be a formal franchise. In April, 1914, such an application was filed. The company's intention to supply current only to buildings owned by the Lawrence interests, and not to any other buildings or to the public in general, was restated very positively in its petition. The Commission was at first of the opinion that the right or privilege secured from the local authorities was not a franchise within the meaning of section 68 of the Public Service Commissions Law, and declined to entertain the application. Subsequently, however, upon a renewal of the application by the company, the Commission made an order on June 23, 1914, approving of the exercise of the privilege to construct a conduit beneath the surface of Pondfield road, and permitting a pair of electric wires for supplying the Colonial Building with electricity to be installed therein.

Thus for the first time, in 1914, Mr. Lawrence's company acquired a certain technical recognition as a public service corporation, although the franchise upon which such recognition was based, limited and restricted as it was, did not really affect the character of the company's business in the slightest degree. It remained, in fact, a purely private concern. It pretended to no public character whatsoever. It sought no general franchises nor exhibited any desire to serve the people of Bronxville with electric

current. In this respect its status was of course quite different from that of the Westchester Lighting Company, which began to do business in Bronxville in December, 1900, as a public utilities company, serving no private interest whatsoever in any exclusive sense. It was after the Westchester Company had succeeded, in the manner we have mentioned, to the rights of its immediate predecessor in Bronxville, that Mr. Lawrence entered into an agreement with the new company, as the result of which the company acquired from Mr. Lawrence the right to construct and operate its lines through the private roadways in Lawrence park. At that time it was the understanding of the Westchester Company that Mr. Lawrence would not establish another plant in Bronxville, even for supplying his own houses. Nevertheless, when he built his new plant in 1905 and commenced to serve his hotel and some adjoining buildings, the established company did not feel that it was in a position to combat his right to do this if he chose. The situation remained the same even after the Lawrence interests constructed new stores, buildings, residences and business blocks, and served these properties with electricity from their own plant — in some cases ejecting the Westchester Company from these buildings after it had obtained a foothold there; in other cases supplying the new buildings with electricity from the Lawrence park plant as soon as they were constructed. All this represented to the Westchester Company a considerable loss of business which it had confidently expected to get, but since the Lawrence Company was in a position to take this business over without seeking any public franchises or altering its status as a private lighting company in the slightest degree, there was nothing that the Westchester Company could do about it, notwithstanding a certain alarm which it commenced to feel over the situation which seemed to be developing. There is no reason to doubt the truth of the statement of the president of the Westchester Company, that if his company had been notified of the pendency of the Lawrence application in 1914 for approval by this Commission of the permit to cross Pondfield road in order to reach the Colonial Building, it would have vigorously opposed the granting of the applica-

[Vol. 14]

Public Service Commission, Second District

tion. But it seems that through some oversight the Westchester Company was not notified. After the connection had been made on the Pondfield road between the Lawrence plant and the Colonial Building, the Westchester Company decided to let the situation stand as it was without attempting to reopen it. The building, after all, belonged to the Lawrence interests, and although it had been necessary for the Lawrence Company to acquire a permit or franchise to cross a public highway in order to carry electricity to it, the Westchester Company seemed to feel that it had better not enter into any quarrel with the Lawrence interests so long as they confined themselves to supplying current to their own properties and did not seek to compete for outside business.

This situation lasted until August, 1916, when the franchises which are now before the Commission for approval were granted to the Lawrence Company by the village authorities. The circumstances attending this transaction have been testified to quite fully by several perfectly reliable witnesses. There can be no great dispute as to what actually took place. The local authorities desired to install a system of public lighting which would, as they thought, be in artistic harmony with the new improvements in the course of completion in the neighborhood of the New York Central railroad station. A local planning commission had agreed upon a system of lighting the new plaza which was submitted to the Westchester Lighting Company for its approval. It involved the placing of wires underground and the erection of lamps of a special ornamental character; and in the conferences which took place, the officials of the Westchester Lighting Company indicated some unwillingness to adopt the project as it was outlined to them. They made counter suggestions which they thought would meet the special needs of the situation as well as, if not better than, the village plan. Thereupon negotiations with the Westchester Company terminated, and Mr. Lawrence was asked whether his company would light the plaza in the manner proposed by the planning committee. He expressed a willingness to undertake the work provided a franchise were given him to install an underground system on Front and Kraft avenues, and Pondfield, Kens-

ington and Sagamore roads, thus enabling him to enter into competition with the Westchester Company in the most thickly populated and profitable section of the village. This condition was agreed to, a street lighting contract was entered into between the village and the Lawrence Park Heat, Light and Power Company, and the franchise which Mr. Lawrence had asked for as a condition to his undertaking the work was passed by the village board. Thereupon the Westchester Company officials gave further immediate consideration to the question what they had better do, in the light of these rather alarming developments. They ended in offering not only to do the work of lighting the station plaza as the village wanted it done, but to do it on terms considerably more favorable to the village than the first proposal had contemplated. In the meantime, the present application had been filed with the Commission; negotiations between the three interested parties — the village authorities, the Westchester Lighting Company and the Lawrence Park Heat, Light and Power Company — for a time delayed its progress, but it finally became apparent that no agreement was likely to be reached, and a decision by the Commission of the questions involved has at length become necessary.

The foregoing facts, which for the most part are undisputed, indicate that notwithstanding some departures from the normal in matters of detail, the case before us is typical enough so far as the principal question which it presents to the Commission for decision is concerned. The question is one which comes up in practically every disputed application under section 68 of the Public Service Commissions Law. In every one of these cases it has to be inquired — and our decision necessarily hinges on the result of the inquiry — whether or not the circumstances of that particular case are such as to require a rigid enforcement of what is now conceded to be the settled attitude of New York State toward wasteful competition between public utility companies. What the policy of the State is in that regard need no longer, we assume, be set forth at great length each time a question of this sort comes before the Commission for determination. At least the broader significance of the step which was taken in 1907 by the Legislature and the

[Vol. 14]

Public Service Commission, Second District

then Governor of New York in enacting the present Public Service Commissions Law must by this time be almost as well understood by the general public as it certainly is by people who are financially interested in utility enterprises. We shall content ourselves, therefore, with saying upon that point that definite recognition was given by the State authorities, in 1907, to what had for some time been an obvious fact: namely, that in the great majority of cases competition between utility companies operating in a single field was producing very bad results indeed from the points of view both of the public and the competing companies. It was recognized that this kind of competition almost invariably resulted in the partial or complete crippling of enterprises which were subject to it, with the inevitable result that utility companies generally were not giving anything like as good service to the people as they might reasonably be expected to give under happier and saner conditions. This evil of cut-throat competition between utility companies was not, of course, the only reason for the passage of the Public Service Commissions Law. Other obvious defects in the existing system clamored to be corrected. But that the Legislature and the Governor, approaching the matter entirely from the public standpoint and certainly without the slightest desire to protect vested interests at the expense of the people, gave particular thought to the question here referred to there can be no doubt whatever. And they concluded, from their study of conditions in every department of the utility field, that better results than any which had been secured in the past could be had in the future by substituting for the foolish and wasteful competition of former years a system of State regulation and control, under which whatever good there might be in the competitive system could be preserved without any of its resulting waste and public loss. The newly created Public Service Commissions, therefore, while by no means restrained from permitting competitive conditions to exist in cases where the public interest seemed to require it, were charged with the duty of protecting established companies which had demonstrated their willingness and ability to serve the people well against such ultimate disasters as seemed under the

competitive system sooner or later to overtake nearly all of these enterprises. With this in view, the power to pass upon applications like the one now before us, and the duty to deny such applications whenever it seemed likely that the conditions from which the people were trying to be relieved would be perpetuated by granting them, was lodged with the Commissions. It is beyond dispute that the whole situation has vastly improved under the new system, and that whatever the trend of future legislation on this subject may be, it will not be toward any return to the competitive conditions of earlier days.

Now, how far do the special circumstances of the present case require the Commission in this instance to depart from the rule which in ordinary controversies of this kind would have to be applied? How far does the somewhat unusual status of the Lawrence Park Heat, Light and Power Company, as explained in the foregoing statement of facts, exempt us from the necessity of regarding that corporation as a newcomer seeking to invade a field which is already adequately served by an existing company? How far does the Westchester Lighting Company's record in Bronxville and elsewhere suggest that it cannot be trusted under our present system of State regulation and control to furnish Bronxville with good service in the future? To these inquiries we have given very careful thought, and have finally concluded that a decision to admit the Lawrence Company at this time as an active competitor in Bronxville would not be consistent with the proper performance of our duty under the laws of the State as they now stand.

We have reached this conclusion with genuine regret. We have tried to take a different view of where our duty lay. We have given full consideration, for instance, to the suggestion that Mr. William V. Lawrence's original operation of a small electric light plant in the basement of the old Gramatan Inn for a few years prior to the burning of that building might justify us in regarding the present Lawrence Park Heat, Light and Power Company, although not organized until five years after the first experiment had been abandoned, as having been engaged in business in Bronx-

[Vol. 14]

Public Service Commission, Second District

ville before the Westchester Company came there, and therefore as being entitled to whatever legal and equitable advantages may attach to such priority. But this theory is one which, upon analysis, cannot possibly be accepted. Five years intervened between the time of the Westchester Company's entry into Bronxville and the organization of the present Lawrence Company. The Westchester Company came to Bronxville in the first instance very shortly after the destruction of Mr. Lawrence's original private electric plant, and largely on the strength of Mr. Lawrence's personal urgency that it should enter this new field. It came with the very distinct understanding on its part that it would never in the future have to meet with competition from Mr. Lawrence, even in connection with property which Mr. Lawrence owned and in whose development he was interested. Upon this understanding it purchased what was left of Mr. Lawrence's original plant. We cannot but feel that under these circumstances there are certain equities growing out of these early relations between the present rivals which operate quite strongly in favor of the position taken by the Westchester Company in the present controversy. At any rate they establish no presumptions in favor of the Lawrence Company's claim. From a legal standpoint, of course, the fact that Mr. Lawrence operated a private plant in connection with the old inn has, and can have, no possible connection with the later action of the Lawrence interests in organizing the present steam heating and lighting company.

Nor do we feel that any weight can be attached to the claim that such recognition as the Lawrence Company received in 1914 from the Public Service Commission, in connection with the placing of its wires under Pondfield road, constituted in effect a determination of the whole question now before us. As a matter of fact, the Commission, basing its understanding upon statements contained in the petitioner's own moving papers, was at that time so strongly of the opinion that the Lawrence Company was a mere private concern, without any public attributes whatsoever, that it refused at first to pass upon the company's application for leave to cross Pondfield road, although no one had appeared in opposition to it.

When, subsequently, upon a renewal of the request, the company's application to cross Ponfield road was granted, merely in order that it might thus be enabled to light a building belonging to the Lawrences on the other side of the road, and for no other purpose, the Commission certainly did not intend to hold that the position of the applicant as an established electric light company in Bronxville was thereafter similar in all respects to that of the Westchester Company, or that the last named company by the granting of that application lost all further opportunity, even when a real invasion of the public lighting field occurred, to raise the question which has been submitted to us in the present case.

So much for the first claim advanced by the Lawrence Company, to the effect that the Westchester Lighting Company does not at the present time occupy the position of the established company in Bronxville at all, but that this position, if held by either company to the exclusion of the other, belongs by right to the Lawrence Park Heat, Light and Power Company. This claim is based, as we have said, in part upon the establishment of a private lighting plant in the old hotel some years before the Westchester Company entered Bronxville, and in part upon the recognition given to the Lawrence Company in 1914 by the Public Service Commission. It is a theory which we cannot accept at all.

The next point which we have to consider is whether, even though it be a fact that the Westchester Company is at present the established company and the Lawrence Company the newcomer, the case is not one where the newcomer ought in the public interest be permitted to enter Bronxville as a competitor. In support of that view it is argued, in the first place, that competition in Bronxville is especially desirable and needful at the present time because the Lawrence Company intends, if allowed to carry out its plans, to place all its wires underground, whereas the Westchester Company has an overhead system and is unwilling to change it. Secondly, it is argued that the rejection, or practical rejection, by the Westchester Company of the village's first proposal to light the plaza in a certain way, settled once and for all whatever prior rights the Westchester Company may originally have had in con-

[Vol. 14]

Public Service Commission, Second District

nection with this work, and that its subsequent offer to carry out the village plan on more favorable terms than the Lawrence Company had accepted came too late to re-establish the Westchester Company in a position of advantage in respect to this undertaking.

Although unable to accept either of these arguments, or both of them together, as conclusive, for reasons which we shall briefly mention in a moment, we must nevertheless say that when they were first addressed to us they made, particularly the second of the two, rather a stronger appeal to our sense of fairness than did either of the claims of the Lawrence Company to which reference has already been made. An underground system of distribution is undoubtedly preferable, in many ways, to a system which calls for the stringing of overhead wires in the public streets. The fact that it is out of sight is, from an artistic point of view, certainly very much in its favor. It saves the trees. It is in less danger from the elements than an overhead system. But on the other side of the ledger must be entered its extremely high cost of installation, which necessitates the charging of higher rates than companies which distribute electricity by overhead wires can live under. It is doubtful whether, having regard for this last mentioned factor, the people of Bronxville and other Westchester villages would favor the placing of electric wires underground at the present time, much as they might like to have them there if nothing but the question of appearances was involved. But however that may be, we do not consider this phase of the controversy as properly before us in the present case. If the people of Bronxville and other Westchester communities, after consideration of the question in all its bearings, should ever decide that they want an underground system throughout the village, the situation will be one that can be taken up with the existing companies at any time, precisely as has been done in the larger cities of the State. In the end the companies will have to bow to the popular will on the subject. Certainly we can see no reason in connection with the distribution systems of the two companies for throwing the bars down in Bronxville to the old competitive evils from which the State has, since 1907, been trying to get away. It is a mere matter of detail which should be approached in an entirely different manner.

Finally, as to the effect which the first rejection by the Westchester Company of the village planning commission's plaza lighting project should have upon our determination in the present case. The argument of the Lawrence Company is that the Westchester Company had its opportunity and voluntarily let it go. Why, it is asked, should a change of mind be permitted after another company has expressed its willingness to do work which the first company had hesitated about doing? We are not surprised, as we have said, that this point of view should appeal quite strongly to many people when it is first suggested to them. It seems to have a flavor of every day justice attaching to it. It falls in with the average man's idea of what is fair and right. The trouble is that the argument fails entirely, as we see it, to take into account the real purpose of the law under which authority to pass on questions like this has been vested in the Public Service Commissions. It presupposes that the primary intent of the law is that the Commission shall, in proceedings of this kind, apportion loss and gain, advantage and disadvantage, as justice may seem to require, between the rival companies appearing before it, without giving any particular thought to the question of how its decision is going to affect the party of the third part to all these transactions, namely, the public. Of course that is not the real purpose of the law at all. As we understand the intent of the statute, the interest that we are called upon primarily to consider, and to which every other interest must be subordinated, is the public interest. The first, if not the only, question which we must ask ourselves is, what influence is our decision likely to have upon the *public* welfare in the community affected by it? Certainly it was to safeguard and advance the public interest that these Commissions were created — not to act as arbiters or judges in controversies between utility companies in which the public interest was being lost sight of entirely. If we are right in thinking that this is the angle from which we must approach the question, then it must be obvious that any view of the case which leaves the public out of the reckoning must be ruled out so far as we are concerned. Applying this to the particular point which we are considering here, it would seem

[Vol. 14]

Public Service Commission, Second District

that the Westchester Company's original rejection of the village plan is of very slight importance compared with the fact that it is now willing to do this work, not merely on as favorable terms as the Lawrence Company will accept, but on considerably better terms from the standpoint of the public. It seems to the Commission that, viewing the matter from the public standpoint, it makes very little difference how or when the final decision of the Westchester Lighting Company to light the plaza on more advantageous terms than the Lawrence Company have accepted was arrived at. That is something with which we are not particularly concerned. It is no doubt absolutely true that in helping to bring the Westchester Company into line in this matter the Lawrence Company has performed a function of genuine public importance — perhaps the first real *public* action in its entire career, and certainly one which has fairly earned for it the gratitude of the people of Bronxville. It may be, also, that if the only question before us was the allotment of rewards and benefits as between these two companies, we should feel like rewarding the Lawrence Company and penalizing the Westchester Company in connection with the plaza lighting transaction. Granting all that, it still from our point of view remains clear, that if we were to permit the Lawrence Park Heat, Light and Power Company, upon this ground alone, to introduce competitive conditions into the Bronxville lighting situation, when we have every reason for thinking that conditions there do not require this to be done in the public interest, we should be acting in deliberate disregard of the law and settled policy of the State, and should be imposing upon the people of Bronxville a condition from which they might in the end be heavy sufferers. It is not likely, either, as we view the situation, that the evil consequences of our doing such a thing would delay very long in putting in an appearance. Ultimately, of course, if the theory of the State in regard to this subject is correct, a competitive condition in the Bronxville electric light field would lead to rate wars there, which might terminate in the bankruptcy of one or both competitors, and in an eventual failure of either to give decent service to the people of Bronxville. Those would be future consequences. But upon the ascertained facts of this case the Bronxville public would, from the

moment its street lighting contract with the Lawrence Company went into effect, receive less for its money than is now offered to it by the Westchester Company. That would be an immediate result of granting the present application, and one which on its face would be in direct conflict with the best interests of the Bronxville community. Nor can the Commission see how the service which the Lawrence Company would give private consumers, if it entered the general field at this time, could be as entirely dependable as that which a seasoned public utility corporation like the Westchester Lighting Company is able to give. We are very far from intending this observation as a slur either upon the good intentions or the abilities of the managers of the Lawrence Company. It is something which seems to be inherent to the situation in which that company stands. It was never established to do a public lighting business, its plant was not built for that purpose, and if it were actually to be put to that purpose now, with an immediate considerable increase in the demands that are made upon it, we apprehend that the company might experience very great difficulty in carrying its new load as a public plant should. Indeed, we have very little doubt that the denial of the present application will prove in the end to be a blessing in disguise to the owners of the property, unpalatable as for the moment such a decision may be.

One other point requires to be considered. It has been suggested that as the competition of the Lawrence Company cannot possibly extend farther than the limits of Bronxville, while the operations of the Westchester Lighting Company cover practically all of Westchester county, the volume of competition which would result from the granting of this application could never conceivably be large enough to seriously threaten the financial position of the larger concern, and that therefore one absolutely essential prerequisite for successful opposition to the present application by the Westchester Company does not exist. But as we understand the situation, it is within our discretion in passing upon an application of this kind to take into account something more than the immediate menace in sight at the time the application is made. We may, and in fact we ought, bear in mind that if competition with the Westchester Company is to be permitted in Bronxville, notwith-

[Vol. 14]

Public Service Commission, Second District

standing that the service there is good and that the company is willing to more than meet the terms of its rival in the matter of the plaza lighting, there would be no possible excuse for a subsequent denial by the Commission of similar applications in other Westchester communities. In passing upon the Bronxville case, therefore, we have had in mind the possibility of its being quoted as a precedent at some future time in connection with similar applications elsewhere in the territory served by the Westchester Lighting Company. We think that, under the circumstances, this is the proper point of view for us to take.

It only remains for us to say that the conclusions we have reached in reference to the several matters above referred to seem to render it quite unnecessary for us to pass definitely at this time upon certain important questions of law bearing upon the validity of the Lawrence Company's franchises, which have been discussed in the briefs of the contending parties. Accordingly, we have not so done, but have disposed of the case entirely upon what we conceive to be its merits, as distinct from its technicalities.

All concur.

In the matter of the Complaint of RESIDENTS OF CATO, MERIDIAN, FAIR HAVEN, and the AUBURN CHAMBER OF COMMERCE against LEHIGH VALLEY RAILROAD COMPANY as to Discontinuance of Trains Nos. 281 and 284 (Passenger) between Auburn and North Fair Haven

Case No. 6127

(Public Service Commission, Second District, October 11, 1917)

Application for restoration of certain trains by the Lehigh Valley Railroad Company.

The Chamber of Commerce of the city of Auburn and numerous citizens living north of that city along the line of what is known as the Auburn division of the Lehigh Valley railroad, have complained of the action of the railroad in discontinuing passenger train No. 281 which formerly left Auburn at 11:05 A. M. and reached North Fair Haven at 12:20 P. M.

This train, as No. 284, left North Fair Haven at 3:25 P. M. and reached Auburn at 4:45 P. M. No. 281 connected at Auburn with a train from the south and 284 made connections with the main line at Sayre. The railroad company has discontinued the service of these two trains north of Auburn and made that city their northern terminus. The testimony in this case showed that by the discontinuance of these trains the orderly business of the community is disarranged, hampered and in some cases almost ruined and that the country interested is an active and prosperous farming and village section. *Held*, that under the circumstances both trains should be restored to service.

A. J. Parker, representing complainants from the northern part of Cayuga county.

Irving Baker, one of the committee of five appointed by the Chamber of Commerce of Auburn.

R. W. Barrett, Assistant General Solicitor, for respondent.

BARHITE, Commissioner.— This proceeding is based upon the complaint made by the Chamber of Commerce of the City of Auburn and by numerous citizens living north of that city adjacent to what is commonly known as the Auburn division of the Lehigh Valley railroad. The northern terminus of this division is at North Fair Haven, on the shore of Lake Ontario and thirty-one and seven-tenths miles from Auburn. There are eleven stations on this division including those at the termini. The country adjacent to the railroad is inhabited by active and prosperous farming and village communities. Auburn, at the southern terminus of the division, is the county seat, and by the State enumeration of 1915 is credited with a population of 32,468, and is naturally the Mecca of those who seek a city for business or pleasure or who have business with the courts or the county government. At the northern terminus is a summer resort similar in character to so many others which dot the shores of the Great Lakes, containing numerous cottages, one or more hotels, and at certain times in the year a considerable population composed largely of those who seek recreation. The evidence is to the effect that in the summer parties from con-

[Vol. 14]

Public Service Commission, Second District

siderable distance — from New York, Buffalo, Sayre and Mauch Chunk — visit this place.

Previous to May 27, 1917, passenger train No. 281 left Auburn at 11:05 A. M. and reached North Fair Haven at 12:20 P. M. This train, as No. 284, left North Fair Haven at 3:25 P. M. and reached Auburn at 4:45 P. M. No. 281 was but the continuation of a train arriving at Auburn from the south over the Auburn and Ithaca branch, and No. 284 proceeded southerly from Auburn and made connections with the main line at Sayre. The railroad company has discontinued the service of these two trains north of Auburn and made that city their northern terminus. Complainants ask that they be restored to their former service.

It is quite difficult to harmonize the answer of the railroad that the trains were taken off "by reason of the shortage of locomotives and engineers and firemen to run the same, it was necessary for respondent to economize in the operation of its locomotive power as much as possible," with the facts, as the train which formerly reached Auburn in the morning and then proceeded north and returned to Auburn in the afternoon now stops at that city and is there held, both train equipment and train crew in idleness, until the afternoon, when it returns south. The round trip is shorter by sixty-three and four-tenths miles, but during the time formerly used in making the trip to North Fair Haven and back neither locomotive, cars nor crew are used for any other purpose. No regular passenger trains are now left upon this division of the road. Train No. 289 leaving Auburn at 5:45 P. M. and reaching North Fair Haven at 7:15 P. M., and train No. 286 leaving North Fair Haven at 7:40 A. M. and reaching Auburn at 9:13 A. M., are mixed trains which do not run very closely to schedule on account of the large quantity of milk and empty cans handled at different points. Furthermore, a person who goes to Auburn on No. 286 must stay in that city for about eight and one-half hours before he returns. If there is a desire to be in the city after 5:45 in the afternoon, then the person must stay one night and two days to accomplish his object. A person who for any reason visits North Fair Haven can arrive only

at 7:15 P. M., and must stay all night and finish his visit by 7:40 the next morning or be compelled to remain two nights and one day.

To remedy the loss of express service caused by taking off trains 281 and 284, an express car has been attached to a local freight leaving Auburn at about 7:50 A. M. This train is very irregular in its movements. At Cato, only seventeen and seventenths miles from the starting point of the train, the records of the railroad company show that from and including August first to and including August eighteenth the train arrived from 9:35 A. M. to 11:05 A. M., a difference of one hour and twenty-five minutes, and departed from 9:50 A. M. to 11:20 A. M., a difference of one hour and thirty minutes. A large number of eggs are shipped from this locality. The percentage of breakage has largely increased. Bread which formerly arrived at North Fair Haven at 12:20 P. M. does not arrive until 7:15 P. M., too late to be sold that night, and must be sold as stale bread. The proprietor of the newspaper which is most largely patronized in the north part of the county, hires a man to take the paper from Weedsport to Cato so that the subscribers may receive the paper in the morning.

Without going further into details, the orderly business of the community is disarranged, hampered, and in some cases almost ruined.

The railroad officials say that the trains taken off did not pay expenses, and they present figures to sustain that assertion. No figures as to the passenger traffic upon the trains taken off are given, except four days in May, 1917, just before the trains were taken from service, hardly a sufficiently long time for a fair estimate. A comparison was made between the ticket sales for four stations out of eleven for the months of June, 1916, and June, 1917. This comparison showed a decrease in the latter year, but in June, 1917, these trains above mentioned had been removed and a bus line had been established to relieve the situation. A comparison in passenger business for the three months of June, July and August in 1917, with the three corresponding months

[Vol. 14]

Public Service Commission, Second District

of 1916, shows a decrease for the former year. We are not favored with a complete statement of the amount of income from the Auburn division, nor a complete statement of the amount earned by trains Nos. 281 and 284 for any reasonable length of time, so that we may determine the excess of expense, if any, over the income either of the division or these trains.

As the company is not required to furnish either additional equipment or men, trains Nos. 281 and 284 should be restored to service.

All concur.

In the Matter of the Petition of JOHN J. NEIL, under Chapter 667, Laws of 1915, for a Certificate of Convenience and Necessity for the Operation of a Stage Route by Auto Buses in the City of Batavia, it Being Proposed that the Route Shall Also Be Operated Between Batavia and the Incorporated Village of Avon, Livingston County

Case No. 6189

(Public Service Commission, Second District, October 11, 1917)

Application for the right to operate a stage route by auto buses in opposition to an existent line which is conceded to be doing good public service.

The application herein is by John J. Neil for permission to operate an auto stage route in the city of Batavia, running between that place and the incorporated village of Avon, Livingston county. There are already two lines of buses which are entirely capable of caring for all the passenger traffic at the point where the petitioner proposes to have his route cross the boundary of the municipality. There is also a street surface railroad caring for the intraurban traffic. The Commission has discretion as to whether such a certificate should be granted. Under the facts in this case the application should be denied. Application denied.

Irvine, C., dissents.

Roger E. Chapman, for petitioner.

William H. Coon, for J. Ernest Sprague, in opposition.

N. A. MacPherson, for H. M. Bradbury, in opposition.

George W. Watson, for Myron A. Russell, in opposition.

BARHITE, Commissioner.— The application in this case should be denied. Would such a result be a reversal of the decision of the Commission in the matter of the petitions of Bartholomew and of Neil (5 P. S. C. 2d D. Rep. 96)? I think not. In the case cited, Commissioner Irvine, writing for the Commission, says: "It follows, therefore, that in passing upon these cases the only question presented to the Commission is whether public convenience and necessity require that either or both of these applicants, each with the right to bring passengers to the city line and to carry passengers from the city line outward, should be permitted to bring their passengers into the center of the city or to pick up their passengers in the center of the city and carry them over the streets to the city limits."

And again: "The evidence shows that the applicant Neil has in the past enjoyed quite a large patronage. It also tends to show that the applicant Bartholomew, if permitted to operate, will probably enjoy a very considerable patronage."

In the case at bar the evidence shows that there are already in operation two lines of buses which are entirely capable of serving and which in fact do serve the wants of all passengers who desire to enter or leave the city at the point where the petitioner proposes to have his route cross the boundary of the municipality. These two lines have the right to receive passengers at any point within the city and to carry them outside, or to bring passengers from the outside to any point within the city. A street surface railroad cares for the intraurban traffic. There is no evidence that the applicant will enjoy any considerable patronage if allowed to operate. Certainly discretion is vested in the Commission as to whether a certificate should be granted, otherwise the statute is a farce. The mere fact that discretion as to each case is given to the Commission would be a sufficient answer to any charge that to deny the application in this case would be inconsistent with the decision

[Vol. 14]

Public Service Commission, Second District

in the Bartholomew case. Each application must stand upon its own particular facts.

Chairman Van Santvoord and Commissioners Emmet and Carr concur; Commissioner Irvine dissents, in opinion.

IRVINE, Commissioner (dissenting).— I cannot concur in the views expressed by Commissioner Barhite. The case is in every respect similar to the Bartholomew case except in the one particular mentioned in Commissioner Barhite's memorandum. It may be that there was more interurban business in prospect for the two lines between Geneva and Penn Yan than for the three lines here involved. However, this is all interurban business and has nothing to do with city transportation. It is true, that if the petition were granted there would be more vehicles traversing the streets of Batavia, but the power to control street traffic does not vest in this Commission, but in the local authorities, who have already granted their consent. In substance, the denial of a certificate is recommended because there is no need for additional facilities for transportation over highways outside the city. Under the present law the Commission has no authority in such matters, and to use its power over urban transportation in order to regulate rural transportation is, I believe, a usurpation of authority.

The present law was enacted solely with a view to giving the Commission regulatory power over jitney operations in cities. It has proved efficient for that purpose and has fully met the evils of unrestricted jitney competition. It repealed the former law which gave the Commission discretionary power over stage route transportation on State and county highways. The repeal of that law had been recommended by the Commission.

The use of the Commission's present power in the manner recommended would indirectly restore a power so taken away in every case where a rural bus line happens to enter a city.

Petition of GROTON ELECTRIC POWER CORPORATION, under Section 68, Public Service Commissions Law, for Permission to Construct in the Incorporated Village of Groton, Tompkins County, an Electric Plant and for Approval of a Franchise Therefor Received from Said Village

Case No. 6198

(Public Service Commission, Second District, October 23, 1917)

A vote of the electors is necessary under the Village Law to authorize the construction of a lighting system in such village.

The Village Law requiring a vote of the electors in order to authorize the establishment of a municipal lighting system, and also forbidding the granting of a franchise to an individual, firm, association, copartnership, or corporation for constructing any lines of poles or wires to furnish light or power within such village when such village owns and uses an electric plant, it follows that a village board and a board of light commissioners may not without a vote of the electors divest itself of title or control of an existing municipal system lawfully established by leasing it and delivering possession to an electrical corporation.

A lease so executed without authority of a vote of the electors, if it has any validity, merely constitutes the lessee the agent of the village for the operation of the plant.

Where a lease has been so executed without a vote of the electors and the lessee put in possession, the village has not lawfully divested itself either of the ownership or the use of the plant, and the village board may not, therefore, without a vote of the electors, grant a franchise to an electrical corporation to construct and maintain poles and wires on the streets and public places.

Edward H. Bostwick, as attorney for applicant.

S. J. Magee, as president of applicant.

Giles M. Stoddard, Village Attorney, for the Village of Groton.

B. L. Buck, President Village of Groton.

Benn Conger, president, and C. F. Brown, manager Corona Typewriter Company, Groton, N. Y.

IRVINE, Commissioner.— This application seeks the approval of a franchise granted under unusual conditions. The village of

[Vol. 14]

Public Service Commission, Second District

Groton owns and for a long time has operated an electric plant for the purpose of furnishing light to the village and its inhabitants. Bonds were issued for its construction, and, apparently, have since been issued for its maintenance, and statements were made at the hearing that it had been necessary for the village to levy taxes to meet deficits of operation. Industries in the village, notably the Corona Typewriter Company, have been greatly enlarged, and at least one new industry has been established. These industries require electric energy in their operation. The growth of the village due to the expansion of its industries creates an increased demand for electric energy. The municipal plant is inadequate to meet these new requirements, and it was stated at the hearing that it was very doubtful whether the electors would be willing to incur any further liability for its extension. In these circumstances a public meeting was held at which a committee was appointed to consider what disposition should be made of the plant. The committee reported that it was expedient to lease the plant upon certain terms recommended to the village board. The applicant corporation was then created, and a lease was entered into by authority of the village board, such action being ratified by the board of water and light commissioners, whereby the plant was leased to the applicant corporation which was immediately let into possession of the plant and has since been operating it. The lease bears date September 12, 1917, but from correspondence in the record it appears that possession was taken September tenth. The lease by its terms is to endure until 1933, when the last of the village bonds issued for its construction and maintenance will mature. The rental is a sum each year equal to the accruing interest on the then outstanding bonds plus \$1,100. Apparently it was intended that by this means the village should provide for the operation and maintenance of the plant, the payment of the interest, and the provision of a sinking fund to amortize the bonds. There is nothing to indicate bad faith on the part of the village officials or of the company, and on the information the Commission now possesses the arrangement seems to be to the decided advantage of the village.

After the lease was executed and the corporation had taken over the operation of the plant, the franchise in question was granted,

authorizing the corporation to erect and maintain in the streets and other places of the village, poles and other instrumentalities for the purpose of supplying the village with electricity for public and private lighting and for furnishing heat and power. The franchise is to terminate concurrently with the lease. At the hearing there was no opposition, and the village and certain of its citizens urged approval of the franchise. It is with great reluctance that the Commission has reached the conclusion that it cannot legally approve the exercise of the franchise as matters now stand.

Subdivision 9 of section 90 of the Village Law is as follows:

"Poles and wires; granting franchises.— To regulate the erection of telegraph, telephone or electric light poles, or the stringing of wires in, over or upon the streets or public grounds, or upon, over or in front of any building or buildings; but no franchise, or right, to erect or construct any line of poles or wires to furnish light or power within such village or to build, construct, erect or maintain any additional line of sewer, water or gas pipes, over, along, across or under any of the streets, avenues, lanes or public grounds of such village shall be granted to any individual, firm, association, copartnership or corporation when such village owns and uses an electric light plant or water works, until the question of granting such right or franchise shall have been duly submitted to the qualified electors of such village, at an annual election, or at a special election duly called and held for that purpose, and adopted by a majority of the votes of duly qualified voters cast at such election."

Section 241 of the same law is as follows:

"Election for lighting system.— A proposition may be submitted at a village election for the establishment of a system for supplying the village and its inhabitants with light by any approved method, or for the acquisition of an existing private system, at an expense in either case not exceeding the sum stated in the proposition."

The plant has been constructed, maintained and operated presumably by virtue of a vote or votes in pursuance of section 241. The question is thus presented as to whether the village at the time

of the granting of the franchise owned and used the plant. If so, the supposed franchise is void under the provisions of subdivision 9, as it is admitted that the question of granting it was not submitted to the electors. The village undoubtedly owns an electric plant, but does it use it? To answer this question we must inquire into the validity of the lease.

We have not found in this State, nor have counsel pointed out to us, any judicial authority throwing light upon the question. We are aware that in two or three instances elsewhere leases of municipally owned public utilities have been sustained. *Ogden City v. Bear Lake & River W. & I. Co.*, 28 Utah, 25; *Baily v. Phila.*, 184 Penn. St. 594; *Los Angeles City Water Company v. City of Los Angeles*, 88 Fed. Rep. 720. These cases were, however, decided under different circumstances and in connection with such different legislation that they do not help us. The Commission believes that the general principles are accurately stated in *Dillon on Municipal Corporations* (5th ed.), as follows:

"Section 991. Municipal corporations possess the incidental or implied right to alienate or dispose of the property, real or personal, of the corporation, of a private nature, unless restrained by charter or statute; they cannot, of course, dispose of property of a public nature, in violation of the trusts upon which it is held, and they cannot, except under valid legislative authority, dispose of the public squares, streets or commons.

"Section 1301. Water works and lighting plants constructed and owned by a municipality for its own use and for the use of its inhabitants belong to the same class of property as wharves, parks, etc., and they are held by the municipality for similar purposes and upon similar trusts. The construction and maintenance of such works and plants are not the exercise of a strictly governmental power or purpose so far as it relates to the State at large, but such works and plants are so far held for governmental purposes and for the benefit of the public that they cannot be appropriated to any other use without special legislation. * * * The duty of the municipality in respect thereto cannot, without express statutory authority, be discharged and devolved upon

another. Without express authority the city cannot sell its water works."

To lease an electric plant for a term of years is to that extent to dispose of it in title, and during the term to divest the municipality of its operation and control. If we revert to the Village Law, we find that by section 244 "the lighting system acquired or established under this article shall be under the control and supervision of the board of light commissioners. The board shall keep it in repair and may, from time to time, if it has sufficient funds, extend such system, if the expense thereof in any year will not exceed \$1,000." By section 245 the board of light commissioners may adopt ordinances for enforcing the collection of light rents and relating to the use of light, and may enforce observance thereto by cutting off the supply of light or by the imposition of penalties. By section 247 the board of light commissioners is required to file annual reports in a manner specified and indicating operation by the village. Everything indicates municipal operation as well as ownership.

If the village may not embark upon such an enterprise without a vote of the electors, is it possible that the village board or the board of light commissioners, or both, can, without such a vote at least, divest the village of the possession and control of the plant so created? In this particular case we are dealing with a small plant and a comparatively small community. No one has charged the village authorities with bad faith. They seem to have proceeded with full regard to the rights of taxpayers and citizens. But suppose that, under exactly the same statutory regulations, the city of New York had constructed and completed its vast new water supply in pursuance of a vote under a section similar to that contained in the Village Law, and that the mayor and board of aldermen and the board of estimate and apportionment should lease that system without a vote to a private water company, and so divest the city of control of its property acquired at the expense of many scores of millions of dollars. It cannot be conceived that any court would sustain such a transaction. We are aware of the subway contracts in New York city, but they were entered into

[Vol. 14]

Public Service Commission, Second District

under special authority, and for the purpose of this argument we are assuming the statutory law relating to New York city to be the same as that relating to villages.

Our conclusion is that if the lease is of any validity it must be construed merely as an arrangement whereby operation of the plant is provided under the terms of the Village Law and that the company is acting only as the village agent. If so, the village is using the plant and the franchise is void for want of a vote. If the lease is void altogether, then the lessee is not lawfully operating; its unlawful possession cannot be made the basis for the granting to it of a franchise without a vote.

Perhaps without retracing the steps already taken the transaction might be ratified at an election to be held for that purpose, but without at least such a ratification the Commission cannot act favorably upon the application.

All concur, except Commissioner Emmet, not present.

In the Matter of the Petition of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY under Section 62 (Now Section 91) of the Railroad Law for the Elimination of Grade Crossings over the New York and Harlem Railroad in the City of White Plains.

In the Matter of the Joint Petition of the CITY OF WHITE PLAINS and THE NEW YORK CENTRAL RAILROAD COMPANY for a Modification of the Order of this Commission Dated April 10, 1912: the Modification Asked for Being with Respect to the Location, Construction, and Design of an Overgrade Crossing of the Railroad near Tibbetts Avenue, in the City of White Plains

Case No. 156

(Public Service Commission, Second District, October 24, 1917)

Elimination of certain grade crossings in the city of White Plains.

On April 10, 1912, this Commission made an order providing for the elimination of the New York and Harlem railroad grade crossing at Tibbetts avenue in the city of White Plains, and in place thereof the

construction of an overgrade crossing upon a line and location adopted by the Bronx Parkway Commission for the proposed Bronx Parkway drive. More recently it has been proposed to build a concrete viaduct over the railroad tracks in White Plains south of the Tibbetts avenue grade crossing connecting the said viaduct on each side of the railroad with new driveways to be laid out and improved. A hearing was given in reference to the new proposition in the city of White Plains, and the Bronx Parkway Commission, the New York Central Railroad Company and several owners of adjacent property were represented, but none of them appeared in opposition to the proposed improvement. Upon all the evidence the Commission held that such improvement would meet with the public requirements and convenience, and upon condition that the State's share of the cost will not be increased beyond the original estimate has decided in favor of the petition sought. Petition granted.

By the Commission.—By joint petition, undated, but received by this Commission on or about the 27th day of June, 1917, the New York Central Railroad Company and the city of White Plains have prayed this Commission for a modification of its order of April 10, 1912, herein, which provided for the elimination of grade crossings of the New York and Harlem railroad in the city of White Plains, in so far as said last mentioned order relates to the Tibbetts avenue crossing, for a determination that in place of the provisions in said order for the Tibbetts avenue crossing an overgrade crossing be constructed upon a line and location adopted by the Bronx Parkway Commission for the proposed Bronx Parkway drive, and for the approval of the terms and conditions of a contract entered into between the above named parties covering the construction of such crossing and the payment of costs.

The order of the Commission of April 10, 1912, as to the White Plains crossings (Railroad avenue, Hamilton avenue, and Tibbetts avenue), provided that the Tibbetts avenue crossing shall be "carried over the railroad tracks by an overhead crossing about twenty-six feet in width center to center of girders at a point about two hundred and twenty feet north of the existing grade crossing of Tibbetts avenue." While all of the other work embodied in the Commission's said order has been carried out, with the knowledge and tacit approval of this Commission, no work has been done at the Tibbetts avenue crossing for the reason that the Bronx Parkway Commission in constructing its Parkway drive found it necessary to cross the railroad at some point not at

[Vol. 14]

Public Service Commission, Second District

once accurately determined in the vicinity of Tibbetts avenue, which construction would render the overgrade crossing of Tibbetts avenue provided for in the Commission's order superfluous, if not actually useless.

It is now proposed, as set forth in said petition, to build a concrete viaduct over the railroad tracks at a point approximately 700 feet south of the existing Tibbetts avenue grade crossing, connecting the same on each side of the railroad with new driveways to be laid out and improved, all as approximately shown upon a general plan hereinafter referred to. It further appears that the cost of the completed work if carried out according to this modified plan as last above mentioned and described is estimated to be largely in excess of \$41,600 in the aggregate, which is the sum originally set aside as the cost of the overgrade crossing contemplated under the Commission's original order. It further appears that it has been determined and agreed by and between the said New York Central Railroad Company, the city of White Plains, and the Bronx Parkway Commission, that in case the proposed modified plan shall receive the approval of this Commission so much of the entire cost of the completed work, including construction, the cost of land, land damages, and all claims and demands whatsoever on account thereof as shall exceed the aforesaid sum of \$41,600 originally estimated as the cost of said elimination, shall be borne and paid for by the Bronx Parkway Commission; and that neither said railroad corporation, the State of New York, nor the city of White Plains shall be required to pay for said work of construction, land, land damages, claims, or demands whatsoever, including cost of any land, if such has already been acquired for the purpose of carrying out the original order, any more than their proportionate shares respectively as fixed by statute of the sum of \$41,600.

A hearing upon this petition, after statutory notice to the applicants and all other interested parties, was held by this Commission in New York city on October 12, 1917, the city of White Plains, the Bronx Parkway Commission, the New York Central Railroad Company, and several owners of property being represented. At this hearing no opposition was expressed to the proposition, and

a plan marked "Exhibit A" was submitted showing the alignment and an elevation of the proposed structure and its approaches, said plan being on file with the papers in the case and bearing the following approval signatures: Harrington M. Thompson, mayor, for the city of White Plains; George A. Harwood and W. F. Jordan, respectively engineering assistant to the vice-president, and manager Grand Central Terminal Improvements, for the railroad company; and Madison Grant and Jay Downer, respectively president, and engineer and secretary, for the Bronx Parkway Commission.

It appears that the location of the proposed new structure will afford access by the people of White Plains to the proposed parkway fully as well as the Tibbetts avenue structure provided for in the previous order would have done. Attention was also called at the hearing to the fact that if the existing order is carried out the structure would have to be built across land now owned by the city of New York under the control of the Bronx Parkway Commission and that probably the consent of the city for the use of this land for such a purpose could not be secured.

In view of the advantages that would result from the construction of a more permanent, elaborate, and commodious structure combined with easy approach grades, the fact that such a structure will apparently better serve the public requirements and convenience, and the consideration that the State's share of the cost will not be increased beyond the original estimate thereof, the Commission has finally determined to grant the petition; and therefore hereby

Orders: 1. That under the terms and provisions of the contract entered into between the parties at interest, namely, the New York Central Railroad Company, the city of White Plains, and the Bronx Parkway Commission, the petition for a modification of the order previously made in so far as the same relates to said Tibbetts avenue crossing be granted, and that the elimination of said crossing and the changing thereof from grade shall be accomplished by the construction of a concrete arch viaduct and approaches thereto by means of which the highway traffic may be carried over the grade of the railroad at a point about 700 feet

southerly of the present Tibbetts avenue crossing, substantially as shown upon a blueprint (exhibit A) hereinbefore referred to, said plan being dated August, 1916, and entitled "Engineering Department Bronx Parkway Commission. Location, Plan & Profile Viaduct to eliminate Tibbetts Ave. Crossing, City of White Plains."

On the viaduct there shall be constructed a roadway forty feet wide in the clear measured between curb lines, and two sidewalks, one on each side of said roadway, each having a clear width of seven and one-half feet. The total width of viaduct between exterior clearance lines shall be about fifty-five and one-half feet. The grade of the roadway and sidewalks on the structure and on the immediate approaches shall be uniformly ascending toward the west at the rate of 2 per cent.

The ends of the viaduct shall be connected to existing and new roadways substantially as shown upon plan exhibit A, or as may be hereafter determined and approved by the Bronx Parkway Commission, the city of White Plains, and this Commission.

2. The parties hereto, the State of New York, the railroad corporation, and the city of White Plains, shall not in any event be required or obligated to pay more than their respective proportionate statutory shares of \$41,600, being the original estimate of the cost of eliminating the Tibbetts avenue grade crossing, making the total amount which the railroad corporation shall pay for its share in the total cost of the completed improvement the sum of \$20,800 without interest, and the total amount which the State shall pay for its share in the total cost of the completed improvement the sum of \$10,400 without interest, and the total amount which the city of White Plains shall pay for its share in the total cost of the completed improvement the sum of \$10,400 without interest.

3. That in accordance with the aforesaid understanding and agreement between certain of the parties, the Bronx Parkway Commission shall assume, pay, and discharge so much of the entire cost and expense of the construction and work herein authorized and provided for, including the cost of any land, rights, or easements necessary or required for the purpose hereof as shall

exceed the sum of \$41,600, which last mentioned sum is to be paid by the railroad corporation, the State of New York, and the city of White Plains, respectively, in such proportions as fixed by the statute in such case made and provided; this order being granted upon the express condition that no financial liability or obligation whatsoever in excess of one-fourth of the sum of \$41,600 shall attach to or fall upon the State of New York on account of the construction and work herein authorized and provided for, and that no part of the cost of such work or of any expenses incidental thereto, including the acquisition or purchase of any lands, rights, or easements necessary or required for the purpose hereof and of any damages on account thereof, or otherwise, in excess of one-fourth of \$41,600, shall be charged upon or be payable or paid out of any moneys which may have been or may be appropriated by the Legislature of the State of New York for the purpose either of the elimination of grade crossings or of the reconstruction of work at crossings either at grade or otherwise. The acceptance of this order by the parties thereto shall be deemed as an undertaking on their part respectively to save the State of New York and this Commission harmless from all costs, expenses, claims, or demands whatsoever on account of this order, and of any of the provisions thereof, in excess of one-fourth of the sum of \$41,600, amounting to the sum of \$10,400, no interest to be added.

In the Matter of the Petition of HORACE S. HOMER, under Section 55-a, Public Service Commissions Law, for Approval of a Plan of Reorganization of the Former Elizabethtown Terminal Railroad Company, the Proposed New Corporation to Be Called "Elizabethtown & Adirondacks Railroad Company, Inc."

Case No. 6042

(Public Service Commission, Second District, October 24, 1917)

Reorganization of an existing railroad company under a new title.

Horace S. Homer, acting in behalf of a committee representing the holders of certain mortgage bonds formerly issued by the Elizabethtown Terminal Railroad Company, purchased at foreclosure sale all the property, premises, rights, interests and franchises formerly owned by the

[Vol. 14]

Public Service Commission, Second District

said Elizabethtown Terminal Railroad Company. The proposition is now made to reorganize the said corporation under sections 9 and 10 of the Stock Corporation Law. The plan of reorganization and an amendment thereof have been filed with the Commission. The Elizabethtown Terminal Railroad Company was a steam road running from the Delaware and Hudson Company's station at Westport, N. Y., to Elizabethtown, all in Essex county, and was about eight miles in length. Under the reorganization the road is to be improved and made serviceable. Ordered that pursuant to the provisions of section 55-a of the Public Service Commissions Law the plan of reorganization of the Elizabethtown Terminal Railroad Company filed March 1, 1916, as amended, be approved. Application granted.

Application filed June 1, 1917.

Hearings held at the office of the Commission in the city of Albany on June 11 and October 24, 1917.

Robert B. Dudley and Isaac W. Dyer for the petitioner.

No one in opposition.

BY THE COMMISSION.—This is an application of Horace S. Homer of New York city for approval of the plan of reorganization of the Elizabethtown Terminal Railroad Company dated March 1, 1916, as amended by supplemental plan and agreement dated June 14, 1917, copies of each having been filed with the Commission. The said Homer, acting for and on behalf of a committee representing the holders of \$90,500 of mortgage bonds formerly issued by the Elizabethtown Terminal Railroad Company pursuant to authority granted by this Commission, purchased on May 4, 1917, at foreclosure sale, all of the property, premises, rights, interests and franchises formerly owned by the said Elizabethtown Terminal Railroad Company. It is now proposed to reorganize said corporation pursuant to the provisions of sections 9 and 10 of the Stock Corporation Law and this Commission is asked to approve the plan of reorganization in accordance with the provisions of section 55-a of the Public Service Commissions Law. This plan of reorganization and the amendment thereof contemplates the issuing of \$100,000 of 6 per cent noncumulative preferred stock and such an amount of common stock as may be approved by the reorganization committee of this Commission; also the making of a mortgage of \$500,000 to secure first mortgage

5 per cent thirty-year bonds of an equal amount of which not to exceed \$225,000 are to be issued at once to provide funds for building and equipping the railroad and such extensions as may be approved by the reorganization committee or the new corporation. It appears that the railroad projected by the Elizabethtown Terminal Railroad Company was a steam railroad running from the Delaware and Hudson Company's station at Westport, N. Y., to the incorporated village of Elizabethtown, all in Essex county, a distance of about eight miles; that approximately \$128,000 has been expended on the property in connection with the purchase of rights of way, construction of road-bed, erection of telegraph lines, fencing right of way, erection of buildings, purchasing of ties and in the payment of other expenses incurred in construction, and that the road-bed is substantially completed, including ballast ready for the laying of ties and rails throughout practically its entire length. The petitioner states that it would cost at least \$160,000 to reproduce the property in its present condition and that it will require a substantial amount in addition to complete the road ready for operation. The proposed plan of reorganization contemplates that \$25,000 of the preferred stock shall be sold at par for cash to provide funds for expenses incurred in reorganization of the property, getting out new bonds, working capital, etc., and that not to exceed \$75,000 of the preferred stock and \$50,000 of common stock shall be issued for the purpose of acquiring the property formerly owned by the said Elizabethtown Terminal Railroad Company which was sold at foreclosure. The petitioner states that in his opinion the earning power of the property when complete will be not less than \$15,000 net per annum. The Commission, after due consideration, being of the opinion that the proposed plan of reorganization as submitted to the Commission should be approved, it is

Ordered, That pursuant to the provisions of section 55-a of the Public Service Commissions Law the plan of reorganization of the Elizabethtown Terminal Railroad Company dated March 1, 1916, as amended by supplemental plan and agreement dated June 14, 1917, both of which have been duly filed with the Commission, be and the same hereby is approved.

[Vol. 14]

Public Service Commission, Second District

In the Matter of the Petition of SCHOHARIE VALLEY LIGHT AND POWER CORPORATION under Section 68 of the Public Service Commissions Law for Permission to Construct an Electric Plant in Portions of the Counties of Schoharie and Schenectady, and for Approval of Franchises Received from Municipalities

Case No. 6216

(Public Service Commission, Second District, October 24, 1917)

Application for leave to construct an electric plant in adjacent portions of Schoharie and Schenectady counties.

The village of Esperance and the towns of Schoharie and Esperance, all in Schoharie county, together with the towns of Princetown and Duaneburg, both in Schenectady county, through their local officials, have granted to the applicant herein, the Schoharie Valley Light and Power Corporation, franchises for their respective communities for the development of an electric lighting and power business. It is the intention of the company to secure its power from the Schenectady Illuminating Company and to extend its lines from the supply line of the latter company through the various towns and villages herein mentioned. The present application is for the approval by the Commission of the local franchises granted. The only opposition to the application is that of the Middleburg and Schoharie Electric Light, Heat and Power Company so far as the application refers to that part of the town of Schoharie in and near Central Bridge. Upon all the evidence the Commission has determined that public convenience and necessity require the approval of the franchises asked for. Application granted with the usual restrictions.

Petition filed September 27, 1917.

Affidavits of publication filed October 22, 1917.

Hearing held at the office of the Commission in the city of Albany, October 22, 1917.

Miller & Golden, by Arthur S. Golden, for the petitioner.

G. Norton Frisbie, for Middleburg and Schoharie Electric Light, Heat and Power Company in opposition.

BY THE COMMISSION.—This is an application by Schoharie Valley Light and Power Corporation for permission to exercise

franchises granted by the following villages and towns on the dates mentioned:

Board of trustees, village of Esperance, Schoharie county, April 16, 1917.

Town board, town of Princetown, Schenectady county, April 14, 1917.

Town board, town of Duanesburg, Schenectady county, June 6, 1917.

Town board, town of Schoharie, Schoharie county, June 29, 1917.

Town board, town of Esperance, Schoharie county, June 26, 1917.

The petitioner has procured the franchises in question to enable it to develop the electric lighting and power business in the communities mentioned, and it proposes to purchase electric energy from the Schenectady Illuminating Company at some point in the town of Rotterdam and to extend its lines from that point through the various towns and villages mentioned. The distance from Schenectady along the route over which the petitioner proposes to carry its lines to the town of Schoharie is approximately twenty-two miles. The first point in the town of Schoharie where the petitioner desires to carry on its business is the unincorporated village of Central Bridge. The Middleburg and Schoharie Electric Light, Heat and Power Company opposes the application of the petitioner so far as it relates to that portion of the town of Schoharie in and near Central Bridge. The last mentioned company supplies electricity in the villages of Schoharie and Middleburg in the county of Schoharie. Its lines do not extend northerly from the village of Schoharie. The unincorporated village of Central Bridge is about four miles northwesterly from the village of Schoharie. It was stated at the hearing, that the Middleburg Company had been intending for some time to extend its lines to Central Bridge in order to supply electricity therein, but that it had not made such extension as yet because of the fact that it had not been advised that there was sufficient business to justify such an extension and furthermore because of the extremely high cost

[Vol. 14]

Public Service Commission, Second District

of labor and material required for such work. There is no objection on the part of the Middleburg Company to the petitioner exercising the franchise granted by the town of Schoharie at other points in the northwesterly part of the town, except in Central Bridge. The petitioner is willing that the Middleburg Company should have an opportunity to extend its lines to Central Bridge if it so desires, but it was stated at the hearing that the residents of Central Bridge are very desirous of being furnished with electricity in the near future. The Commission having determined that public convenience and necessity require the exercise of the foregoing franchise by the Schoharie Valley Light and Power Corporation in the villages and towns mentioned, except in that portion of the town of Schoharie known as the unincorporated village of Central Bridge, it is

Ordered: 1. That pursuant to the provisions of section 68 of the Public Service Commissions Law, the permission and approval of this Commission be and they hereby are given to the Schoharie Valley Light and Power Corporation to construct, maintain and operate an electric plant in the village of Esperance, Schoharie county, N. Y., together with all transmission and distribution lines required for use in connection therewith, and to the exercise by it of the franchise granted to it by the board of trustees of said village on April 16, 1917, subject to all of the terms and conditions therein set forth.

2. That pursuant to the provisions of section 68 of the Public Service Commissions Law, the permission and approval of this Commission be and they hereby are given to the Schoharie Valley Light and Power Corporation to construct, maintain and operate an electric plant in the town of Princetown, Schenectady county, N. Y., together with all transmission and distribution lines required for use in connection therewith, and to the exercise by it of the franchise granted to it by the town board of the town of Princetown on April 14, 1917, subject to all of the terms and conditions therein set forth.

3. That pursuant to the provisions of section 68 of the Public Service Commissions Law, the permission and approval of this Commission be and they hereby are given to the Schoharie Valley

Light and Power Corporation to construct, maintain and operate an electric plant in the town of Duanesburg, Schenectady county, N. Y., together with all transmission and distribution lines required for use in connection therewith, and to the exercise by it of the franchise granted to it by the town board of the town of Duanesburg on June 6, 1917, subject to all of the terms and conditions therein set forth.

4. That pursuant to the provisions of section 68 of the Public Service Commissions Law, the permission and approval of this Commission be and they hereby are given to the Schoharie Valley Light and Power Corporation to construct, maintain and operate an electric plant in the town of Schoharie, Schoharie county, N. Y., together with all transmission and distribution lines required for use in connection therewith, and to the exercise by it of the franchise granted to it by the town board of the town of Schoharie on June 29, 1917, subject to all of the terms and conditions therein set forth; but the said Schoharie Valley Light and Power Corporation or its successors shall not sell and distribute electricity in that portion of the town of Schoharie comprised within the unincorporated village of Central Bridge without the further order of this Commission.

5. That pursuant to the provisions of section 68 of the Public Service Commissions Law, the permission and approval of this Commission be and they hereby are given to the Schoharie Valley Light and Power Corporation to construct, maintain and operate an electric plant in the town of Esperance, Schoharie county, N. Y., together with all transmission and distribution lines required for use in connection therewith, and to the exercise by it of the franchise granted to it by the town board of the town of Esperance on June 26, 1917, subject to all of the terms and conditions therein set forth.

6. The approval of said franchises is not a determination nor does it imply a determination that the rates mentioned therein are just or reasonable or that they are not subject to change under the provisions of the Public Service Commissions Law or other laws of the State of New York.

[Vol. 14]

Public Service Commission, Second District

7. This order is not intended to and shall not be construed to authorize any construction work in or upon any State or county highway unless and until the consent to and approval of such construction work shall have first been duly given by the State Commission of Highways.

In the Matter of the Practices of Carriers in the Application of Their TARIFFS RELATING TO THE FURNISHING OF GRAIN DOORS AND BULKHEADS, and the Reasonableness of the Maximum Allowance Made under such Tariffs when Lumber for Grain Doors or Bulkheads is Furnished by the Shipper

Case No. 5910

(Public Service Commission, Second District, November 1, 1917)

The providing of lumber by common carriers to be used for grain doors and bulkheads must necessarily be left to the common carriers either to provide the materials or to make a money allowance in lieu thereof.

Principles heretofore decided as to the duty of carriers to furnish lumber for grain doors and bulkheads for bulk shipments of grain and produce adhered to (See New York State Shippers Protective Assn. v. N. Y. C. & H. R. R. Co., 2 P. S. C., 2nd Dist., 251; Matter of the Discontinuance by Carriers of the Regulations and Practices Governing the Furnishing of Temporary Doors or Bulkheads, 4 P. S. C., 2nd Dist., 500), but under present conditions *held*:

It is not practicable or economical for the carrier to have lumber available at all stations at all times, so that it must be left practically to the carrier's election to provide lumber or make the allowance therefor, subject of course to complaint and investigation in particular cases.

Also *held* that the present allowance of a maximum of two dollars per car is insufficient, and for the time being the allowance should be at the rate of five mills per hundred weight of lading in the car.

Myron D. Short for shippers concerned.

Parker McCollester, W. A. Newman, and W. S. Kallman for the New York Central Railroad Company.

T. H. Burgess and Henry Adams for Erie Railroad Company.

John E. MacLean for The Delaware and Hudson Company.

Stewart C. Pratt and H. C. Burnett for Lehigh Valley Railroad Company.

E. P. Bates for the Pennsylvania Railroad Company.

R. W. Davis for Buffalo, Rochester and Pittsburgh Railway Company.

Arthur Learoyd for the Delaware, Lackawanna and Western Railroad Company.

LEVINE, Commissioner.— This case reopens a question which has for a number of years, from time to time, occupied the attention of the courts and of the Commission. See *Loomis v. Lehigh Valley R. R. Co.*, 147 App. Div. 195; 208 N. Y. 312; 240 U. S. 43; *New York State Shippers Protective Assn. v. N. Y. C. & H. R. R. Co.*, 2 P. S. C., 2d Dist., 251; *Matter of the Discontinuance by Carriers of the Regulations and Practices Governing the Furnishing of Temporary Doors or Bulkheads*, 4 id. 400. In the opinion in the last case the previous proceedings are recited. In brief, and without rehearsing in detail the history of *Loomis v. Lehigh Valley* and the former proceedings before the Commission, it may be said that the contest centers around a question as to whether it is the duty of the carrier or the shipper to furnish the necessary lumber for equipping with grain doors or bulkheads cars for the transportation of grain and produce in bulk. The determination of the Commission in the two previous cases was that it is the primary duty of the carrier to furnish such lumber, and the carriers were required to file tariffs providing for furnishing such lumber when doors or lumber should be available at the shipping point, but when doors or lumber should be furnished by the shippers an allowance should be made of fifty cents per door three feet in height, provided that the maximum allowance per car should not exceed two dollars. A complaint was filed by L. G. Loomis & Son against the New York Central Railroad Company (case No.

[Vol. 14]

Public Service Commission, Second District

5511), complaining that the New York Central refused to furnish lumber in a certain instance. When the matter came on for hearing it developed that the carriers generally furnished the lumber and coopered the cars for shipment of ex-lake grain at Buffalo, but that the New York Central, apparently as a matter of policy, did not have lumber available at other points of shipment and thereby remitted the shippers to the allowance provided by the tariffs. It also appeared that to a greater or less extent other carriers pursued the same practice. That specific complaint was therefore closed, and the Commission made an order that, without formal pleading, it enter upon a hearing concerning the lawfulness and reasonableness of the tariffs and of the practices of the carriers in interpreting and enforcing them. That is the present inquiry. The shippers contend that it is the primary duty of the carrier to have lumber available at points of shipment, and that the shippers should be required to furnish the lumber and take the allowance only in unusual cases where the carrier happens not to be able to furnish the lumber. The shippers also contend that the allowance, reasonable when first made, has become entirely insufficient owing to the rapidly increasing prices of lumber. The shippers do not demand and have not demanded that the carriers furnish nails or do the actual coopering, or that they should make any allowance therefor. Both parties to the controversy seem to accept the principle announced by the Commission in the last case — usually called the 1915 case; that fundamentally, the problem is one of economy and convenience; how can a commodity be brought to the market most conveniently and cheaply for the ultimate consumer? The shippers' contention is that they can more readily supply the nails and do the actual work, except at Buffalo, but the carriers can best and most cheaply provide the lumber. The carriers contend that the Commission has been wrong in its previous decisions, and particularly that it has misinterpreted *Loomis v. Lehigh Valley*, 208 N. Y. 312. In support of their effort to induce the Commission to change the former rulings, they rely upon the principle that a carrier may not be required to furnish or provide any service without adequate compensation, and challenge the presumption made by the Commission in the 1915

case, at least as far as produce is concerned, that rates had adjusted themselves to the practice of the carriers furnishing lumber or making allowances. Elaborate and forceful arguments have been advanced in support of these contentions, but in the main we think the previous decisions were sound.

It is argued that the effect of *Loomis v. Lehigh Valley*, 208 N. Y. 312, was merely to determine that it is the common law duty of the carrier to furnish a car properly equipped to carry its lading, but that under the Public Service Commissions Law the Commission might provide otherwise. In our opinion the Commission is without authority, under present legislation, to change the common law as announced by the highest tribunal. Section 37 of the Public Service Commissions Law provides — "Every railroad corporation or other common carrier engaged in the transportation of property shall, upon reasonable notice, furnish to all persons and corporations who may apply therefor, and offer property for transportation, sufficient and suitable cars for the transportation of such property in carload lots."

This is a statutory declaration of the common law as announced by the Court of Appeals in the *Loomis* case. It is doubtless within the power of the Commission to regulate the manner of its enforcement, but it can not change the principle. The Court of Appeals said unmistakably, that grain doors or bulkheads are an essential part of a suitable car for the transportation of grain in bulk. The evidence shows that one or the other is essential for the transportation of produce in bulk. The statute says that suitable cars must be furnished by the carrier. That this is a correct interpretation of the *Loomis* case appears in the following language in the opinion: "Primarily the question is not one of rates or regulation at all, but of the carrier's failure to perform its initial duty to give the shippers cars fit for the service for which they were furnished. That is obviously a duty with reference to which the Commission has power to make rules and regulations, and even rates, but until it acts within the scope of its powers, the subject is one of which our courts have cognizance under the general rules of law." The court was speaking of the absence, at the time the cause of action arose, of rules and regulations governing perform-

[Vol. 14]

Public Service Commission, Second District

ance of the duty, and holding that the case was one within judicial cognizance, for the reason that the Commission had not regulated the performance of the legal duty. It did not hold and it can not be inferred from the opinion, that the Commission has authority to relieve the carrier of its legal duty. The court, however, did recognize that the carrier could not always conveniently specifically perform the duty and that in such cases the shipper should be permitted to perform it and charge the carrier with the fair expense.

In support of the contention that the rates on produce do not include the cost of door protection, and that the rates on grain do not include compensation for such cost, except as to ex-lake grain at Buffalo, there was much evidence introduced as to the present and past practice of the carriers, and as to the history of the rates. We gather that it is conceded that the practice of furnishing grain doors for ex-lake grain at Buffalo has prevailed so long that it must be assumed that rates have adjusted themselves to this practice. The argument that the rates on produce have not been so adjusted, and that, therefore, for furnishing the doors or bulkheads the carrier should itself receive extra compensation, is founded solely upon the practical stability of rates on produce for many years, except for the effect of the comparatively recent 5 per cent and 15 per cent increases, and that no change was made at the time the practice of furnishing bulkheads and grain doors was inaugurated. It does not follow from this that the rates are non-compensatory for the service performed, but as to this we express no opinion, for the matter is not properly presented for disposition in this proceeding. The carriers might at any time have filed increases in their tariffs if they thought they were non-compensatory for the entire service, subject of course under the present law to suspension and investigation. They may still so do, but they have not yet undertaken any change except the general increases lately made. We still think the presumption is sound that the rates are adjusted to the practices required by the Commission since 1909. If not, the remedy is by adjusting the rates and not by changing the practice, if the view we have taken as to the duty of the carrier is correct. It should be by an

adjustment of the freight rate and not by special allowances for special services. The volume of this traffic is so great that it can not be classed as an occasional and special service to be reflected in a special allowance. It is said that the rate is the same on produce whether shipped in bulk or in containers, and that this shows that the rates have not been adjusted. If the cost of transportation is higher upon shipments in bulk, there is no reason that the rates should be the same as upon shipments in containers.

A further argument should be noted, that if this Commission shall require carriers to equip cars with door protection for intra-state shipments, the result will be that New York State shippers will enjoy services not enjoyed by other shippers. This is solely because the Interstate Commerce Commission has not required the carriers to provide lumber or make allowances on interstate shipments. We can not depart from the law of this State, as we think it has been declared, merely on this account. If the rule so operates that an unjust discrimination results, the remedy must be elsewhere: with the Legislature, with the Interstate Commerce Commission, or with some tribunal not controlled by the law of New York.

We are convinced by the evidence in the present case that it is often not practicable or economical for the carrier to have lumber available at all stations for the purpose of providing doors or bulkheads. At small stations, and especially non-agency stations, there are no provisions made for storing such lumber and protecting it against the elements, and against improper use or theft, and no such provisions could properly be required. If unreasonable delays are to be avoided, local lumber dealers must in many instances supply the lumber; and if the allowance is adequate, there seems no reason why the shipper should not provide it. He knows better than the carrier what lumber will be required and when. We are, therefore, of the opinion that the duty of the carrier, as it has been defined by court and the Commission, can be best performed by leaving it practically to the carrier's election to provide lumber or make the allowance. If a proper allowance be fixed, the carrier will exercise this election according to cir-

cumstances and will probably find it to its advantage actually to supply the lumber at all points of regular and considerable shipments.

It is very clear that the allowance of two dollars per car maximum has become insufficient. The evidence is not adequate to enable us to determine what would be a fair average maximum allowance at present prices. The suggestion was made by one of the shippers, concurred in by others, and it was accepted by the carriers as reasonable, if any allowance is to be made, that it should be at the rate of five mills per hundred weight of lading. This is the only basis we have in the present record for fixing it. It may be that owing to very recent increases in prices it is too low. The time may come when it will prove too high, but the way should be left open for both shippers and carriers to come to the Commission for readjustment of the amount of the allowance. At this time, particularly, an allowance based upon the lading in the car is desirable. It will aid in the effort of shippers and carriers alike to induce full loading. The flat allowance heretofore prevailing, inadequate under any circumstances, was an inducement to minimum loading. Moreover, the amount of lumber used naturally varies with the load in the car, and the allowance should vary accordingly.

We, therefore, think that the tariffs now in force should be retained except that the allowance, when the shipper furnishes the lumber, should be on the basis of five mills per hundred weight of lading, and that it should be understood, that while the carrier when practicable should furnish the lumber, it must be left to the carrier to determine when it is practicable, subject of course to complaint and investigation in particular cases.

All concur.

BY THE COMMISSION.—Upon the facts found and for the reasons stated in the accompanying opinion, it is ordered:

1. That the respondents, the New York Central Railroad Company; Erie Railroad Company; Lehigh Valley Railroad Company; The Pennsylvania Railroad Company; Frank Sullivan

Smith, as receiver of the Pittsburgh, Shawmut and Northern Railroad Company; the Delaware, Lackawanna and Western Railroad Company; Buffalo, Rochester and Pittsburgh Railway Company; the Delaware and Hudson Company; Genesee and Wyoming Railroad Company; Skaneateles Railroad Company; Marcellus and Otisco Lake Railway Company, be and the same hereby are severally directed and required to publish and file, in the manner prescribed by the Public Service Commissions Law and the regulations of this Commission established thereunder, tariff schedules applicable to the transportation of grain and produce, in bulk, within the state of New York, providing allowances for grain doors and bulkheads where the lumber therefor is provided by the shipper, at the rate of five mills per cwt. of lading in the car.

2. That said tariffs shall be filed on or before November 10, 1917, and may become effective upon five days' notice to the Commission and the public.

3. That within ten days after service of a copy of this order, the respondents shall severally notify the Commission as to their acceptance thereof.

In the Matter of the Petition of NIAGARA FALLS GAS AND ELECTRIC LIGHT COMPANY under Section 69 Public Service Commissions Law for Authority to Make a Mortgage for \$800,000 and to Issue Now \$800,000 in Bonds to be Secured by Said Mortgage

Case No. 5892

(Public Service Commission, Second District, November 8, 1917)

Application of a gas and electric light company for leave to issue a mortgage in the sum of \$800,000.

Upon the petitions filed herein and the submission of the form of the proposed mortgage and the reports of the divisions of capitalization and light, heat and power, from all of which the facts underlying the application herein are deducible, the Commission authorized the petitioning company to execute and deliver to the Equitable Trust Company of New

[Vol. 14] Public Service Commission, Second District

York, as trustee, a mortgage or deed of trust upon its entire plant and property, to secure an issue of first refunding mortgage thirty-year gold bonds in the aggregate amount of \$5,000,000 face value, bearing interest at 5 per cent per annum, and that said company be authorized to issue \$800,000 face value of its 5 per cent thirty-year first refunding mortgage gold bonds under such mortgage. Provisions and limitations with regard to the said bonds specifically set forth. Petition granted.

Petition filed February 6, 1917.

Supplemental petition filed March 29, 1917.

Form of proposed mortgage filed April 25, 1917.

Report of division of capitalization dated May 22, 1917.

Report of division of light, heat and power dated July 10, 1917.

Revised form of proposed mortgage filed October 27, 1917.

Final report of division of capitalization dated November 3, 1917.

By THE COMMISSION.—Now, therefore, upon the foregoing record, ordered as follows:

1. That the proposed journal entries contained in the final report of the division of capitalization in this proceeding dated November 3, 1917, which shall be served upon the corporation, such entries being listed on pages 16 to 19 inclusive, shall be entered upon the books of the Niagara Falls Gas and Electric Light Company, and that within thirty days of the service of this order verified proof that such entries have been made shall be submitted to the Commission.

2. That the Niagara Falls Gas and Electric Light Company is hereby authorized to execute and deliver to the Equitable Trust Company of New York, as trustee, a corporation organized and existing under the laws of the State of New York, a certain indenture, deed of trust or mortgage upon all its plant and property, to secure an issue of first refunding mortgage thirty-year gold bonds to the aggregate amount of \$5,000,000 face value, bearing interest at the rate of 5 per cent per annum, payable semi-annually, a copy of which indenture has been filed with the Commission herein and that the form thereof so filed is hereby approved; provided that said company shall have no right or

authority to issue any bonds pursuant to the terms of said mortgage except as herein authorized by the Commission.

3. That upon the execution and the delivery of said indenture so authorized there shall be filed with this Commission a copy thereof in the form in which it was executed and delivered together with an affidavit by the president or other executive officer of the company stating that the indenture as executed and delivered is the same as that herein approved by the Commission; and no bonds secured thereby shall be issued or sold until the provisions of this clause have been complied with.

4. That the Niagara Falls Gas and Electric Light Company is hereby authorized to issue \$800,000 face value of its 5 per cent thirty-year first refunding mortgage gold bonds under the afore-said mortgage.

5. That said bonds of the total face value of \$800,000 may be sold for not less than 80 per cent of their face value and accrued interest to give net proceeds of at least \$640,000.

6. That said bonds of the face value of \$800,000 so authorized or the proceeds thereof to the amount of \$640,000 shall be used solely and exclusively for the following purposes:

(a) For the discharge of the following obligations of the petitioner outstanding at December 31, 1916:

1. Five per cent twenty-year first mortgage bonds due July 1, 1921..	\$150,000
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2. Five per cent thirty-year first consolidated mortgage bonds due July 1, 1933, and upon such discharge, for the payment of a like amount of the floating debt for which these bonds have been pledged as collateral security	92,000
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3. Five per cent five-year third mortgage bonds due July 1, 1909..	51,500
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\$293,500

[Vol. 14]

Public Service Commission, Second District

(b) For extensions of and improvements to the plant and distributing system of the petitioner as detailed in affidavit of Peter D. Young attached to the application herein as follows:

1. Construction of new gas plant	\$186,000	
2. Construction of approximately twenty-five miles of distribution mains	175,000	
3. Services, meters, etc.	31,500	
		<u>\$392,500</u>
		<u>\$686,000</u>
Amount unprovided for.		<u><u>\$46,000</u></u>

in so far as the same may be applicable, provided:

(1) That such bonds or the proceeds thereof shall be applied on such new construction summarized in subdivision (b) hereof only in so far as the same is a real increase in the fixed capital of the petitioner and not a replacement of any part of such fixed capital or substitution for wasted capital or other loss properly chargeable to income in accordance with the definitions contained in the uniform systems of accounts for electrical and gas corporations adopted by this Commission.

(2) That there shall be no charges to fixed capital on account of engineering services in connection with such construction unless such engineering services shall have been rendered either by other than the regular officers and employees of the corporation, or, in a proper case, where such services may have been rendered by certain of such officers or employees under an express assignment to such construction or improvement work.

(3) That if there shall be required for the aforesaid purposes subject to the limitations herein contained, a sum less than the amounts set opposite thereto, no portion of the proceeds realized from the sale of such bonds over the actual cost thereof shall be

used for any purpose without the further order of this Commission.

(4) That the unit prices contained in the affidavit of said Peter D. Young attached to the petition herein are not intended to be and must not be construed by the petitioner as having been determined upon by the Commission as the actual cost of the property and work to be acquired and done and thus properly chargeable to fixed capital but are intended and shall be construed only to be a present estimate of the probable cost of such property and work, the actual cost of which must be actual expenditures made as defined by the Commission's uniform systems of accounts for electrical and gas corporations.

7. That if the said bonds of a total face value of \$800,000 herein authorized shall be sold at such price as will enable the company to realize net proceeds or more than \$686,000, no portion of the proceeds of such sale in excess of the last aforesaid sum shall be used for any purpose without the further order of the Commission.

8. That none of the said bonds herein authorized shall be hypothecated or pledged as collateral by the Niagara Falls Gas and Electric Light Company unless any such pledge or hypothecation shall have been approved and authorized by this Commission.

9. That the Niagara Falls Gas and Electric Light Company shall for each six months' period ending December thirty-first and June thirtieth file not more than thirty days from the end of such period a verified report showing:

(a) What bonds have been sold or otherwise disposed of during such period in accordance with the authority contained herein.

(b) The date of such sale or disposition.

(c) To whom such bonds were sold.

(d) What proceeds were realized from such sale.

(e) Any other terms and conditions of such sale.

(f) With respect to subdivision (a) of clause No. 6 of this order there shall be shown the amount expended during such period of the proceeds of the bonds herein authorized for each of the purposes specified therein.

[Vol. 14]

Public Service Commission, Second District

(g) With respect to subdivision (b) of clause No. 6 of this order there shall be shown:

1. In detail the amount expended during such period of the proceeds of the bonds herein authorized for each of the purposes specified therein and the account or accounts under the uniform systems of accounts for electrical and gas corporations to which the expenditures for such purposes have been charged, giving all details of any credits to fixed capital in connection with such expenditures.

2. A summary of the expenditures for each of such purposes during the period covered by the report.

3. A summary by the prescribed accounts showing the expenditures during such period.

In reporting under sections 1 and 2 of subdivision (g) of this clause there shall be further shown the expenditures of the proceeds of the bonds herein authorized to the beginning of the period reported upon and a total showing such expenditures to the end of the period, together with a statement of the balances in the fixed capital accounts as of beginning and ending of such period.

Such reports shall continue to be filed until all of said bonds shall have been sold or disposed of and the proceeds expended in accordance with the authority contained herein, and if during any period no bonds were sold or disposed of or proceeds expended, the report shall set forth such fact.

10. That the authority contained in this order to issue bonds is upon the express condition that the petitioner accepts and agrees to comply in good faith with the provisions hereof and before any bonds are issued pursuant hereto and within thirty days of the service hereof, the said company shall file with the Commission a satisfactory verified stipulation over the signatures of its president and secretary accepting this order with all its terms and conditions, and such order shall be void and of no force or effect until such stipulation shall have been filed as last above provided.

11. It is nevertheless expressly provided that in all respects other than as directed in clause No. 1 hereof, this order shall not be effective, and particularly that no bonds shall be issued or sold

hereunder by the applicant, nor shall the issue or sale of any such bonds be deemed to have been approved and authorized by this Commission unless and until compliance with the requirements of said clause shall have been made, reported to and approved as sufficient by this Commission.

Finally it is determined and stated, that in the opinion of the Commission the money to be procured by the issue of said bonds herein authorized is reasonably required for the purposes specified in this order and that such purposes are not properly chargeable to operating expenses or to income except to the amount of \$178,761.98.

Petition of THE NICKEL PLATE CONNECTING RAILROAD CORPORATION (a) under Section 9 Railroad Law and Section 53 Public Service Commissions Law, as to Construction and Exercise of Franchises; (b) under Section 89 Railroad Law, as to its Railroad Crossing Highways; (c) under Section 98 Railroad Law as to its Railroad Crossing Other Railroads

Case No. 6188

(Public Service Commission, Second District, November 8, 1917)

Application of a connecting steam railroad for approval of its franchises and right to begin construction of its roadbed.

The Nickel Plate Connecting Railroad Corporation submitted a request to the Commission asking that a certificate be granted showing that public convenience and necessity require the construction of such railroad. Application granted.

Kenefick, Cooke, Mitchell & Bass, and Herbert D. Howe, for the Nickel Plate Connecting Railroad Corporation.

F. A. Hermans, for State Commission of Highways.

BY THE COMMISSION.—A petition having been filed with this Commission by the Nickel Plate Connecting Railroad Corpora-

tion (a) for a certificate that the provisions of section 9 of the Railroad Law have been complied with by said corporation, and that public convenience and necessity require the construction of its railroad as proposed in its certificate of incorporation (b) under section 53 of the Public Service Commissions Law for permission to begin construction of its railroad, and for approval of the exercise of its franchises and rights as a railroad corporation and certain franchises or rights to cross streets (hereinafter named) in the village of Blasdell formerly exercised by Wellsville and Buffalo Railroad Corporation; (c) under section 89 of the Railroad Law for a determination of how its railroad shall cross highways; (d) under section 98 of the Railroad Law for a determination of whether its railroad shall cross steam railroads hereinafter named, above, below or at grade, and the proportion of expense of each crossing to be paid by each railroad;— and a public hearing on said petition having been held by this Commission in the city of Albany on October 31, 1917, at which those named above appeared, and at which witnesses testified to the public convenience and necessity of the proposed railroad; and it appearing that the length of the proposed railroad is 4.015 miles, “the southerly terminus thereof being the point of connection with the present railroads of the New York, Chicago and St. Louis Railroad Company and the Pennsylvania Railroad Company at or near Hamburg Siding, located immediately west of Camp road in Hamburg Township, Erie County, New York; the northerly terminus of such road being the point of connection with the present railroad of the South Buffalo Railroad Company about eighteen hundred and eighty (1880) feet north of the south line of the city of Lackawanna, all in the county of Erie;” and it appearing that the object of constructing this railroad is to afford better convenience for the interchange of freight cars between the New York, Chicago and St. Louis railroad, the Lehigh Valley railway, the New York Central railroad, the South Buffalo railway, and the Pennsylvania railroad, relieving congestion on tracks in Buffalo and saving time; and it appearing that petitioner proposes to use a portion of the South Buffalo rail-

way in the city of Lackawanna for a connection with the Lehigh Valley railway;—and this Commission finding from the evidence that the provisions of section 9 of the Railroad Law have been complied with by said corporation and that public convenience and necessity require the construction of its proposed railroad, and that the construction of its railroad and the exercise of its franchises and rights as a railroad corporation as well as franchises or rights to cross streets in the incorporated village of Blasdell formerly exercised by the Wellsville and Buffalo Railroad Corporation are necessary and convenient for the public service; it is ordered:

(1) That a certificate under section 9 of the Railroad Law shall be issued to the Nickel Plate Connecting Railroad Corporation to the effect that it has complied with the provisions of said section and that public convenience and necessity require the construction of its railroad as proposed in its certificate of incorporation.

(2) That this Commission under section 53, Public Service Commissions Law, hereby permits and approves construction of the railroad of the Nickel Plate Connecting Railroad Corporation and the exercise by said corporation of its franchises and rights as a railroad corporation and certain franchises or rights to cross streets (hereinafter named) in the incorporated village of Blasdell formerly exercised by the Wellsville and Buffalo Railroad Corporation.

(3) That this Commission, under section 89 of the Railroad Law hereby determines that it is impracticable for the railroad of the Nickel Plate Connecting Railroad Corporation to cross otherwise than at grade the highways hereinafter named, except where a method of crossing otherwise than at grade is named and in such cases this Commission hereby determines that such crossings shall be over the grade of the highway as hereinafter named; to wit:

Town of Hamburg

- (a) At the grade of the Camp Road highway.
- (b) Over the grade of the Big Tree Road highway.
- (c) At the grade of the Bay View Road highway.

Village of Blasdell

(d) Over the grade of the Mile Strip Road highway.

(e) Over the grade of the Lake View Road highway.

Protection of the said highway crossings permitted to be at grade will be determined by the Commission in the future.

It is hereby provided that if, in the future, the crossing at grade of this railroad and the said Camp Road highway, or the crossing at grade of this railroad and the said Bay View Road highway in the town of Hamburg is changed from grade, the entire cost of said change shall be borne by the Nickel Plate Connecting Railroad Corporation or its successor, and that within thirty days after the service of a copy of this order on said corporation there shall be filed with this Commission a statement signed by the president and secretary of said corporation accepting this provision as to payment of cost.

(4) That this Commission under section 98 of the Railroad Law hereby determines that the railroad of The Nickel Plate Connecting Railroad Corporation,

(a) shall cross the railroad operated by the Pennsylvania Railroad company in the town of Hamburg, Erie county, near the said Camp Road highway, at grade, and that the entire expense of such crossing (irrespective of the cost of protecting the crossing) shall be borne by the Nickel Plate Connecting Railroad Corporation;

(b) shall cross the New York, Chicago and St. Louis railroad in the town of Hamburg, Erie county, near the said Camp Road highway, at grade, and that the entire expense of such crossing (irrespective of the cost of protecting the crossing) shall be borne by the Nickel Plate Connecting Railroad Corporation;

(c) shall cross the railroad operated by the Pennsylvania Railroad Company, the New York, Chicago and St. Louis railroad and the New York Central railroad at the Mile Strip Road highway in the village of Blasdell, above the grade of said existing railroads, which are contiguous, and that the entire expense of such crossing shall be borne by the Nickel Plate Connecting Railroad Corporation;

(d) shall cross the South Buffalo railway (switching tract or tracks) in the city of Lackawanna, at a point not far from the south city line, at grade, and that the entire expense of such crossing (irrespective of the cost of protecting the crossing) shall be borne by the Nickel Plate Connecting Railroad Corporation.

Under section 56 of the Railroad Law trains and locomotives approaching said crossings when constructed must come to a full stop except under the circumstances set forth in section 56. If it shall be desired in the future that the full stop shall be discontinued, petition must be made to this Commission under section 56 and the matter of signal apparatus will then be determined.

Petitions to this Commission by the Nickel Plate Connecting Railroad Corporation under section 53, Public Service Commissions Law, for permission to exercise rights which said corporation may acquire from the courts under sections 21 and 22 of the Railroad Law as to these crossings of highways and railroads, shall be made in the future.

In the Matter of the Petition of the ERIE RAILROAD COMPANY under Section 55 Public Service Commissions Law for Authority to Issue \$15,000,000 6% series A Bonds under its Refunding and Improvement Mortgage Dated December 1, 1916

Case No. 6246

(Public Service Commission, Second District, November 15, 1917)

Authority granted the Erie Railroad Company to issue certain bonds for purposes stated specifically in the order herein.

The Erie Railroad Company has made application for leave to issue \$15,000,000 face value of its 6 per cent twenty-year series A refunding and improvement mortgage bonds under the deed of trust given to the Bankers Trust Company, as trustee, December 1, 1916, to secure an authorized issue of bonds of a total face value of \$500,000,000, the issue asked for to be sold at not less than ninety per cent of their face value and accrued interest to produce net proceeds of at least \$13,500,000. The purposes to which this issue is to be applied are the reimbursement of the company's treasury for moneys actually expended for the acquisition of fixed assets within five years prior to the filing of the petition

[Vol. 14]

Public Service Commission, Second District

herein and which were not obtained from any obligations of the corporation; the pledging of \$8,750,000 to be issued as collateral security for the payment of a short term loan aggregating \$5,000,000 principal amount, and to pledge the remaining \$6,250,000 of said bonds as collateral security for the payment of other and additional loans. No loan upon less advantageous terms to the petitioner than of the said \$5,000,000 shall be made and consummated until after approval by the Commission. Upon the report of the division of capitalization dated November 13, 1917, the application was granted subject to the usual conditions.

Petition filed October 31, 1917.

Report of division of capitalization dated November 13, 1917.

Affidavits (2) filed November 15, 1917.

By THE COMMISSION.—Now, therefore, upon the foregoing record, ordered as follows:

1. That the Erie Railroad Company is hereby authorized to issue \$15,000,000 face value of its 6 per cent twenty-year series A refunding and improvement mortgage bonds under a certain indenture, deed of trust or mortgage dated the 1st day of December, 1916, given to the Bankers Trust Company, as trustee, to secure an authorized issue of bonds of a total face value of \$500,000,000.

2. That said bonds of the total face value of \$15,000,000 may be sold for not less than 90 per cent of their face value and accrued interest to give net proceeds of at least \$13,500,000.

3. That said bonds of the face value of \$15,000,000 so authorized, or the proceeds thereof to the amount of \$13,500,000 shall be used solely and exclusively for the reimbursement of the treasury of the petitioner for moneys actually expended for the acquisition of fixed assets within five years prior to the filing of the petition herein and which were not obtained from the issue of stocks, bonds, notes or other evidence of indebtedness of such corporation.

4. That the Erie Railroad Company is hereby authorized to forthwith pledge \$8,750,000 in amount of the bonds herein authorized to be issued as collateral security for the payment of a short term loan aggregating \$5,000,000 principal amount; and is authorized without further application to this Commission to pledge the

remaining \$6,250,000 in amount of said bonds as collateral security for the payment of other and additional loans, upon the basis of not more than \$175 in amount of bonds for each \$100 in amount of loan. Provided, nevertheless, that any such additional loan as to its rate of interest, net return to the borrower, period of duration and otherwise shall be made upon terms not less advantageous to the company than shall result from the above mentioned loan of \$5,000,000. It being the intent hereof that no loan upon less advantageous terms to the petitioner than of the said \$5,000,000 loan shall be made and consummated herein unless the approval and permission of this Commission shall have been first and expressly given and granted.

5. That the Erie Railroad Company shall make verified reports to the Commission covering each pledging of bonds which it shall make under the authority of this order within twenty-four hours after such pledging shall have been made, which reports shall show the amount of the loan or loans, the rate of interest thereupon, and the amount of bonds pledged as collateral security therefor. Any additional information in regard to said loans, or any of them, which thereafter may be required by this Commission shall upon its request therefor be promptly supplied by the corporation.

6. That the proceeds of the loans to secure which bonds herein authorized may be pledged as collateral security shall be used solely and exclusively for the purpose for which the bonds or their proceeds are herein authorized to be used.

7. That the Erie Railroad Company shall for each six months' period following the date of this order file not more than thirty days from the end of such period a verified report showing:

(a) What bonds have been sold or otherwise disposed of or pledged during such period in accordance with the authority contained herein.

(b) The date of such sale or pledging.

(c) To or with whom such bonds were sold or pledged.

(d) What proceeds were realized from such sales or pledgings.

(e) The principal of each loan for which such bonds are pledged.

[Vol. 14]

Public Service Commission, Second District

(f) The total face value of bonds which remain pledged as collateral security for said loans on the closing date of such period.

(g) Any other terms and conditions of such transactions.

(h) The amount used during such period of the proceeds of the bonds herein authorized for the purpose specified herein.

Such reports shall continue to be filed until all of said bonds shall have been sold or disposed of and the proceeds used in accordance with the authority contained herein, and if during any period no bonds were sold or disposed of or proceeds used, the report shall set forth such fact.

8. That this proceeding is hereby continued upon the records of the Commission until the examination which is to be made of the books, accounts and property of the petitioner herein shall have been concluded and the corrections, if any, which by reason of such examination this Commission shall determine to be proper and necessary shall have been made, accepted by the corporation, and entered in its accounts to the satisfaction of the Commission.

9. That the authority contained in this order to issue bonds is upon the express condition that the petitioner accepts and agrees to comply in good faith with the provisions hereof and before any bonds are issued pursuant hereto and within thirty days of the service hereof, the said company shall file with the Commission a satisfactory verified stipulation over the signatures of its president and secretary accepting this order with all its terms and conditions, and such order shall be void and of no force or effect until such stipulation shall have been filed as last above provided.

Finally, it is determined and stated, that in the opinion of the Commission the money to be procured by the issue of said bonds herein authorized is reasonably required for the purpose specified in this order and that such purpose is not in whole or in part reasonably chargeable to operating expenses or to income.

In the Matter of the Petition of the HUNTINGTON RAILROAD COMPANY under Subdivision 1, Section 49 of the Public Service Commissions Law for Permission to Increase Passenger Fares

Case No. 6086

(Public Service Commission, Second District, November 20, 1917)

Under the provisions of section 181 of the Railroad Law fixing a rate of fare of five cents upon a street surface railroad within the limits of any incorporated city or village, the Public Service Commission has the right to increase such fare or to reduce the same if sufficient facts are presented to it to justify such action on its part.

When a street surface railroad is entitled to increase its rates, fares or charges. Rates fixed by franchise restrictions, contracts or agreements by street railroad corporations are not void *ab initio* but merely voidable.

Under the provisions of section 49 of the Public Service Commissions Law, the Commission has the power, after a hearing, to determine the just and reasonable rates of fare to be thereafter observed and in force as the maximum to be charged for the service to be performed by a street surface railroad company, and to fix the same by order, notwithstanding restrictions in a franchise purporting to limit such maximum fare to five cents within the limits of an incorporated city or village.

A street surface railroad is entitled to an increase in its maximum rates, fares, or charges whenever it shall appear, after a hearing and investigation by the Public Service Commission, that such rates are insufficient to yield a reasonable average return upon the value of the property actually employed in the public service and provide for a reservation out of income for surplus and contingencies.

Franchise restrictions, contracts or agreements as to rates to be charged by street railroad corporations are neither void *ab initio* nor of perpetual force, but are to be considered as voidable either by mutual agreement between the parties, or by act of the Legislature, or by the Public Service Commission proceeding with due regard to the prescribed circumstances under which its authority to thus regulate has been conferred.

Held, that the company should be permitted to file tariffs with the Commission affecting an increase in its fares in the villages in which it operates from five to six cents and an increase of one cent in each of the zones in which the company now operates, so that the fare between the termini of the company will be thirty-six cents where the same is now thirty cents.

[Vol. 14]

Public Service Commission, Second District

Joseph F. Keany, for applicant.

No one in opposition.

This application, although itself unopposed, was determined after an opportunity had been afforded all persons interested in similar cases to present oral arguments and briefs on the legal questions involved, and upon consideration of the arguments and briefs so presented.

CARR, Commissioner.— This is an application by the Huntington Railroad Company for permission to charge a fare of six cents in the incorporated villages in which it operates, upon the ground that the maximum rates, fares, and charges charged by it therein are unjust and unreasonable and do not yield a reasonable average return upon the value of the property employed in the public service. In other words, it is claimed that the rates which it is required to charge pursuant to the provisions of the statute and its franchises are confiscatory.

A hearing was held by the Commission in the city of Albany on August 29, 1917, for the purpose of giving the interested parties an opportunity to be heard. No one appeared in opposition to the application, but there was filed with the Commission on August 28, 1917, by the town board of the town of Huntington, a protest against the granting of the application on the ground that it would be a great detriment to the citizens of the town of Huntington to allow an increase in the passenger fares of the petitioner and would injure the village of Huntington Station, Huntington village, and Halesite, and asking that the application be dismissed. No other objection against the application has been presented to the Commission.

It may be said in passing that the petitioner is one of the numerous street railways throughout the State which is represented by the "Special Committee of the Electric Railways of New York State on Ways and Means for Obtaining Additional Revenues," and that this proceeding is the first one taken up by the

Commission for determination in which the petitioner is one of the companies represented by that special committee.

The line of the Huntington Railroad Company extends from Huntington Harbor on the north shore of Long Island through the village of Huntington to Huntington Station, thence southerly through Melville, Farmingdale and Amityville to Great South Bay on the south shore of Long Island, a distance of eighteen and six-tenths miles. The company was incorporated in 1890, with an authorized capital stock of \$30,000, under the provisions of chapter 252 of the Laws of 1884 which was a general act relating to the construction, extension, and operation of street surface railroads. All of the stock is issued and outstanding and the company is controlled by the Long Island Railroad Company. From time to time after 1890 the corporation obtained franchises from the local authorities in the towns and villages through which its line now runs permitting it to construct and operate a street surface railroad therein, and the road as it at present exists was finally completed about the year 1910. There are six five cent fare zones between Huntington Harbor and Great South Bay, and if the petitioner is permitted to increase its fares in the villages through which it operates, the fare in each of the zones will be increased to six cents and the fare between terminals will be increased from thirty to thirty-six cents. While it is true that this application has not been actively opposed before the Commission, yet we are confronted at the outset with some perplexing legal questions which must be disposed of before we can proceed to consider the case on its merits. The fact that there is no contest does not relieve the Commission from the duty of passing upon these legal questions, because if we are unable to resolve them in favor of the petitioner we would then be powerless to grant the relief which is sought. The legal questions referred to are—

First, Has the Commission the power to increase the rate of fare in an incorporated village or city beyond that prescribed in section 181 of the Railroad Law; and

Second, If it should be determined that the Commission has

[Vol. 14]

Public Service Commission, Second District

power to increase the statutory rate above referred to, has it also the power to permit such an increase in fare notwithstanding there may be a restriction in the franchise or franchises under which the corporation is operating its railroad, limiting the fare to five cents in the territory where the increased fare is asked for. This case presents an opportunity for disposing of both of these questions because the petitioner operates in villages as well as towns, and so it is subject to the provisions of section 181 of the Railroad Law, and, in addition, there are conditions in certain of its village franchises restricting the fare to five cents within the limits thereof.

In May, 1890, the petitioner applied to the commissioners of highways of the town of Huntington for consent to construct, maintain, and operate its railroad on certain streets and highways in the town, village, and harbor of Huntington, and such consent was given on May 17, 1890. There was no condition relative to the rate of fare.

On May 15, 1890, the railroad company applied to the board of trustees of the town of Huntington for its consent to the construction, maintenance, and operation of a street railroad upon certain streets, avenues, and highways in the town, village, and harbor of Huntington; and on May 27, 1890, the board of trustees of the town gave its consent to such operation. There were no conditions laid down in this consent, and it was stated that it was given because the enterprise was considered worthy of encouragement and not on the ground that the board of trustees claimed any authority or control over or responsibility connected with the matter stated in the petition.

On July 25, 1906, the corporation made application to the highway commissioners of the town of Huntington for consent to construct an extension of its railroad on certain highways in the town of Huntington. On October 6, 1906, the highway commissioners of the town gave their consent to such construction, setting forth in such consent certain conditions relative thereto. I quote from the consent the part relative to such conditions which it is necessary for us to consider in connection with this case:

"The foregoing franchise hereby granted is made upon, limited by and subject to the following limitations, conditions and covenants which are hereby made a condition and essential part thereof, to wit:

"(g) That neither said company nor its successors or any party or company operating said railroad hereby authorized shall at any time hereafter charge a fare or fee in excess of fifteen cents per person for transportation between the present station of the Long Island Railroad Company at Huntington and any part of the village of Farmingdale, said operating company to fix a charge of five and ten cents respectively for intermediate travel in zones to be fixed and located by it.

"(k) That said railroad company and its successors shall comply with the Railroad Law of the State of New York as to consents of property owners, local authorities and otherwise and file and record the necessary consents in the office of the clerk of the county of Suffolk, New York, before commencing construction of said road.

"(n) That the provisions and conditions of this contract, consent or charter shall in perpetuity bind the said Huntington Railroad Company, its successors and assigns, and each and every party or corporation which shall build, own, maintain or operate said railroad or any part thereof at any time hereafter.

"(o) This consent and authority is intended to be given only to the extent that the highway commissioners of said town as a board, individuals or otherwise, have power or authority to grant the same."

On October 5, 1906, the Huntington Company made application to the board of supervisors of Nassau county for consent to build, maintain, and operate an extension of its railroad on certain highways in the county of Nassau, and on November 13, 1906, such consent was given "upon the following conditions which shall be agreed to and accepted by said railroad in writing under its corporate seal before such consents shall become operative." Then there follow in the consent twenty-seven paragraphs setting forth in great detail the requirements which must

be observed by the corporation in the construction, maintenance, and operation of its railroad. These conditions relate to track construction, rails, poles, paving, etc. In fact they cover practically every detail which might be mentioned in connection with the building of a new street railroad in a community. Those paragraphs which it is essential for use to consider in this case are as follows:

"I. That the provisions of article 4 of the Railroad Law shall be complied with by said railroad company and the acceptance above referred to shall be filed in the office of the clerk of the county of Nassau within sixty days of the granting of this franchise. * * *

"XXIV. That neither said company nor its successors operating said road shall charge any greater rate of fare than five cents per passenger for the following stations or distances:

"From the railroad station at Huntington to the DeForest property;

"From the DeForest property to the church near property of Mary E. Duryea;

"From the church near the property of Mary E. Duryea to or near the railroad station at Farmingdale;

"From at or near the railroad station at Farmingdale to the north line of the village at Amityville;

"From the north line of the village of Amityville to Wellwood avenue, Lindenhurst;

"From Wellwood avenue, Lindenhurst, to the railroad station at Babylon;

"And shall carry a passenger from any part of the village of Amityville to any part of the village of Farmingdale for ten cents.

"XXVII. The franchise hereby granted shall continue (unless otherwise sooner terminated as herein provided, or as may be provided by law) forever in force with the reservation, however, to the County of Nassau, its successors and assigns, and to the local authorities who may have in charge the streets and highways aforesaid, of imposing at the end of the period of fifty years from the date of the acceptance of this franchise, a fair and reasonable rental for the use of said streets and highways. * * *"

This consent was accepted by the corporation on January 3, 1907, and a bond given by the company as provided in the franchise.

On October 5, 1906, the company petitioned the highway commissioners of the town of Oyster Bay for consent to construct, maintain and operate an extension of its railroad on certain highways in that town, and such consent was given on March 12, 1907, and contained a provision that the company should comply with the Railroad Law of the State of New York, but there was no reference to the rate of fare.

On October 11, 1906, the company made application to the board of trustees of the village of Farmingdale for consent to construct, maintain, and operate an extension of its railroad on certain streets in the village, and such consent was given on November 5, 1906, "upon, limited by and subject to the following limitations, conditions and covenants which are hereby made a condition and essential part thereof;" and then the various conditions and limitations, most of which relate to the method of constructing and operating the railroad, are set out in detail. The following is the paragraph in said franchise relating to fare:

"(h) That neither said company nor its successors operating said road shall charge any greater rate of fare than five cents per passenger for the following stations or distances:

"From the railroad station at Huntington to the DeForest property;

"From the DeForest property to the church near property of Mary E. Duryea;

"From the church near the property of Mary E. Duryea to or near the railroad station at Farmingdale;

"From at or near the railroad station at Farmingdale to the north line of the village of Amityville;

"From the north line of the village of Amityville to Wellwood avenue, Lindenhurst;

"From Wellwood avenue, Lindenhurst, to the railroad station at Babylon.

"And shall carry a passenger from any part of the village of Amityville to any part of the village of Farmingdale for ten cents."

[Vol. 14]

Public Service Commission, Second District

There is also a paragraph setting forth that the railroad company shall comply with the Railroad Law of the State of New York; and another stating that "the provisions and conditions of this contract, consent or charter shall in perpetuity bind the said Huntington Railroad, its successors and assigns."

On April 5, 1908, the board of trustees of the village extended the time within which the railroad might be built and on May fourth said board of trustees gave its consent to a modification of the franchise in respect to certain streets in the village.

On October 2, 1906, the company made application to the highway commissioners of the town of Babylon for consent to construct, maintain, and operate an extension of its railroad on certain highways in that town, and such consent was granted on November 2, 1906, and contained substantially the same conditions as the franchise granted by the village of Farmingdale, except that clause (n) states that the consent is only given to the extent that the highway commissioners have power or authority to grant the same. It also contains a provision that the Railroad Law is to be complied with by the company. The following is the paragraph relative to fares:

"(h) That neither said company nor its successors operating said road shall charge any greater rate of fare than five cents per passenger for the following stations or distances:

"From the railroad station at Huntington to the DeForest property.

"From the DeForest property to the church near property of Mary E. Duryea;

"From the church near the property of Mary E. Duryea to or near the railroad station at Farmingdale;

"From at or near the railroad station at Farmingdale to the north line of the village of Amityville;

"From the north line of the village of Amityville to Wellwood avenue, Lindenhurst;

"From Wellwood avenue, Lindenhurst, to the railroad station at Babylon;

"And shall carry a passenger from any part of the village of

Amityville to any part of the village of Farmingdale for ten cents."

There was also a provision in the consent that it should be binding upon the corporation in perpetuity.

On September 8, 1906, the corporation applied to the board of trustees of the village of Amityville for consent to construct, maintain and operate an extension of its railroad on certain streets in that village. An additional application was made to said board on April 19, 1907, and the consent was granted on June 10, 1907, "upon the following conditions which shall be agreed to and accepted in writing by said company under its corporate seal before said consents shall become operative;" then follow thirty-one paragraphs setting forth the conditions under which such railroad may be built and operated, providing for the giving of a bond, the payment of percentages of gross receipts, speed of cars, method of lighting the same, etc. The last paragraph in the consent states that it is given on condition that the railroad company and its successors shall comply with the provisions of the Railroad Law applicable thereto. The following is the provision relative to fares:

"14. The maximum passenger fare on the lines of this company, within the corporate limits of the village of Amityville, shall not exceed the sum of five cents for a continuous ride in the same general direction, and in the event of the Babylon Railroad Company obtaining a franchise in the village of Amityville, passengers shall be transferred from the cars of the Huntington Railroad Company to said Babylon Railroad Company, and where similar requirements are made of other railroads to the cars of such other railroad company that may operate in said village, and shall accept transfers from any such railroad without additional charge being made therefor, within the corporate limits of the village of Amityville, for a continuous ride in the same general direction. * * *"

Paragraph 29 also purports to grant the franchise for a period of fifty years. This was accepted in writing by the railroad company on June 18, 1907, and a bond was given in the amount mentioned in the franchise.

[Vol. 14]

Public Service Commission, Second District

On July 26, 1909, the board of trustees of the village of Amityville gave consent to the construction of the railroad on an alternative route upon the terms and conditions set forth in the original franchise.

Several of the franchises provide for a termination of the consent in the event that the corporation shall fail to observe the conditions set forth therein.

It will thus be seen that there is squarely presented in this case both of the legal questions which we have hereinbefore referred to, and that even though the corporation might be authorized to increase the fare fixed by the statute, yet there are still left for consideration the restrictions in the franchises under which the corporation is now operating, some of which are apparently in the form of contracts between the parties, and it must be decided whether or not these restrictions are obligatory upon the corporation and divest the Legislature of its power, as administered through this Commission, to regulate the fares on this railroad where these franchise conditions now prevail.

In order to present this matter intelligently we believe it is desirable to consider at some length the history of the rates now fixed by statute for street railroads.

Section 181 of the Railroad Law which now prescribes the rate of fare within the limits of any city or village is as follows:

"Section 181. Rate of fare. No corporation constructing and operating a railroad under the provisions of this article, or of chapter two hundred and fifty-two of the laws of eighteen hundred and eighty-four, shall charge any passenger more than five cents for one continuous ride from any point on its road, or on any road, line or branch operated by it, or under its control, to any other point thereof, or any connecting branch thereof, within the limits of any incorporated city or village. Not more than one fare shall be charged within the limits of any such city or village, for passage over the main line of road and any branch or extension thereof if the right to construct such branch or extension shall have been acquired under the provisions of such chapter or of this article; except that in any city of the third class, or incorporated

village it shall be lawful for such corporation to charge and collect as a maximum rate of fare for each passenger, ten cents, where such passenger is carried in a car which overcomes an elevation of at least four hundred and fifty feet within a distance of one and one-half miles. This section shall not apply to any part of any road constructed prior to May sixth, eighteen hundred and eighty-four, and then in operation, unless the corporation owning the same shall have acquired the right to extend such road, or to construct branches thereof under such chapter, or shall acquire such right under the provisions of this article, in which event its rate of fare shall not exceed its authorized rate prior to such extension. The legislature expressly reserves the right to regulate and reduce the rate of fare on any railroad constructed and operated wholly or in part under such chapter or under the provisions of this article; and the public service commission shall possess the same power, to be exercised as prescribed in the public service commissions law."

The first general act passed by the Legislature of this State relative to street railroads is comprised in chapter 252 of the Laws of 1884. There were numerous sections of this act setting forth the method for incorporating a street surface railroad and what was necessary to be done in order to entitle such a corporation to construct, maintain, and operate such a railroad. Section 4 which refers to the proceedings required to procure the consent of the local authorities states "the consent of the local authorities shall in all cases be applied for in writing and when granted shall be upon the express condition that the provisions of this act pertinent thereto shall be complied with and shall be filed in the office of the county clerk of the county in which said railroad is located." Section 7 provided for the sale of the franchise at public auction "subject to all of the provisions of this act." Section 8 provided for the payment of a certain percentage of the gross receipts of such corporation in cities having a population in excess of 250,000 and "in any other incorporated city or village, the local authorities shall have the right to require as a condition to their consent to the construction, operation or extension of a railroad under the provisions of this act, the payment annually of such percentage of

[Vol. 14]

Public Service Commission, Second District

gross receipts, not exceeding 3 per cent, into the treasury of said city or village as they may deem proper." There was also a provision relative to paving between and outside the tracks, and the section relative to fares was as follows:

"Section 13. No company or corporation incorporated under or constructing and operating a railroad under the provisions of this act shall charge any passenger more than five cents for one continuous ride from any point on its road or on any road, line or branch operated by it or under its control, to any other point thereon, or on any connecting branch thereof within the limits of any incorporated city or village. This section shall not be construed to apply to any part of any road heretofore constructed and now in operation unless such company shall acquire the right to extend such road or to construct branches thereof under the provisions of this act in which event its rate of fare shall not exceed its authorized rates prior to such extension."

Prior to the enactment of this law, chapter 606 of the Laws of 1875 set forth the method by which a corporation might be created to build and operate a railroad by steam in the larger cities of the State, and the act which was passed in 1884 prohibited the construction and operation of a street surface railroad under the provisions of the act of 1875. As hereinbefore stated, there was no general act referring specifically to the construction, maintenance, and operation of street railroads prior to the act of 1884, and many of the street railroads which were organized before that year were created by special charter although some of them were incorporated under the provisions of chapter 140 of the Laws of 1850. While the Court of Appeals apparently decided in the case of *N. Y. Cable Co. v. Mayor, etc.*, 104 N. Y. 1, among other things that street railroads could not be incorporated under the general act of 1850 relating to railroads, yet this case was overruled in this respect by the same court in *Matter of Washington St. A. & P. R. R. Co.*, 115 id. 442, in which it squarely held that the act of 1850 authorized the incorporation thereunder of street surface railroads. The act of 1850 did not make any requirement that the consents of abutting property owners must be obtained before the construction

of a street railroad should be commenced, and the only consent that was necessary at that time was that of the common council of the city. Chapter 140 of the Laws of 1854 contained a specific requirement that the common councils of the several cities in the State should not permit a railroad for the transportation of passengers to be constructed in any street or avenue without a consent of the majority in interest of the property owners in the streets or avenues in which the railroad was to be built, and it also provided that the common council of the city might grant authority to construct and establish such a railroad upon such terms, conditions, and stipulations in reference thereto as it might see fit to prescribe; also that the grant should be made to such person or persons who would agree to carry passengers at the lowest rate of fare. This act was repealed by chapter 565 of the Laws of 1890, also by chapter 581 of the Laws of 1910. Such parts of the act as were inconsistent with the provisions of the act of 1884 were also repealed thereby. Prior to the time the act of 1854 was enacted, the common council of a city had no power to grant a franchise permitting the operation of a street railway and to set forth therein conditions with respect to its construction and operation. *Mayor v. Eighth Avenue R. R. Co.*, 118 N. Y. 389; *Potter v. Collis*, 156 id. 16.

Apparently the demand for increased transportation facilities in the cities and villages of the State made it desirable to have some definite legislation relative to street surface railroads therein, and hence the enactment of chapter 252 of the Laws of 1884, which in many respects attempted to collaborate the prior laws which had been passed covering the construction and operation of such railroads. Another reason for this legislation was the fact that under the provisions of chapter 10 of the Laws of 1860, and the amendment to section 18 of article III of the Constitution in 1874, it was practically impossible after the latter date to build and operate a street surface railroad in the city of New York.

It is particularly noticeable that prior to 1884 no specific provision had been made in the general railroad law to cover the rate of fare within a municipality, except as it might be claimed

[Vol. 14]

Public Service Commission, Second District

that it was covered by subdivision 9 of section 28 of the Laws of 1850, wherein it was stated that the fare for passengers should not exceed three cents per mile. Section 33 of that same act also provided that the Legislature might from time to time, after a railroad completed thereunder was opened for use, alter or reduce the rate of freight, fare, or other profits upon such road, but that the same should not be reduced without the consent of the company so as to make such profits less than 10 per cent upon the capital actually expended.

However, after 1854 many of the cities of the State were authorized to prescribe the terms, conditions, and stipulations under which a railroad might be built in the streets of a city, and that condition of affairs continued generally until 1884, except in the instances where specific acts were passed providing for the construction of railroads in streets, such for instance as the act of 1875, and also bearing in mind the numerous special acts passed by the Legislature relating to specific railroads between the years 1854 and 1875. But this power which was conferred upon cities by the Legislature of 1854 was of course subject to the right of the Legislature to revoke the power at any time, or enlarge it or diminish it as might to it seem best. That the Legislature had this power is we think beyond dispute, for the Supreme Court of the United States has held that a city is the creature of the State, and a municipal corporation is simply a political subdivision of the State existing by virtue of the exercise of the power of the State through its legislative department, and that the Legislature could at any time terminate the existence of the municipal corporation and provide other and different means for the government of the district comprised within the limits of the former city. Municipalities are merely part of the machinery employed in carrying on the affairs of the State, and they have only such rights and powers as are conferred upon them by the State, and this may be enlarged or restricted at the will of the State acting through the Legislature. *Worcester v. Worcester St. Ry. Co.*, 196 U. S. 539-548, and cases there cited.

As substantiating the view that the Legislature has since 1850 at least, and up to the time of the creation of the Public Service Commissions, considered that it had absolute power to increase or reduce rates on street railroads, it may be proper at this time to call attention to some of the many acts passed by the Legislature relative to such matters other than the general acts of 1884, 1890, 1892, and 1910.

Chapter 468 of the Laws of 1853, relating to a double track railroad on Division avenue, in Brooklyn, provides for a fare not to exceed six and one-fourth cents.

Chapter 77 of the Laws of 1854 authorized the Brooklyn City Railroad Company to charge the fare set forth in the franchise granted by the common council, and such other rates as might be agreed upon between the city and the company.

Chapter 198 of the Laws of 1860 required a fare of not to exceed five cents on the railroad from Hunters Point to Astoria.

Chapter 255 of the Laws of 1860 authorized the Cherry Valley and Sprakers Horse Power Railroad Company to charge such fares as it might elect.

Chapter 462 of the Laws of 1860 authorized a railroad corporation to charge not over three cents from First street to Bushwick avenue, in Brooklyn.

Chapter 199 of the Laws of 1862 authorized an extension of the Grand Street and Newtown Railroad Company, and provided for a fare of not to exceed three cents on the extension.

Chapter 233 of the Laws of 1862 authorized the Watervliet Turnpike Company to lay railroad tracks and to charge a five cent fare for any distance not over two miles, and for additional distances a rate of two cents per mile.

Chapter 85 of the Laws of 1863 authorized the Troy and Cohoes Railroad Company to charge seven cents from Troy to Cohoes, and five cents from Cohoes to Green Island, and the same amount from Green Island to Troy.

Chapter 217 of the Laws of 1863 authorized the railroad from Brooklyn to Newtown to charge a fare of not exceeding four cents from First street to Bushwick avenue, in Brooklyn.

Chapter 406 of the Laws of 1863 authorized the railroad from Geddes to Syracuse to charge a fare not exceeding six cents.

Chapter 183 of the Laws of 1864 ratified certain privileges and immunities granted by the common council of the city of Albany to the Albany Railway, and fixed a fare of five cents within the limits of the city of Albany, and for any distance outside of the city a sum not exceeding ten cents.

Chapter 265 of the Laws of 1864 permitted the Dunkirk and Fredonia Railroad to charge a fare not in excess of ten cents for any distance, and not more than five cents for riding half the length of the road.

Chapter 769 of the Laws of 1865 provided that the Sheepshead Bay and Seashore Railroad might carry passengers in boats as well as cars, and to charge ten cents for ferriage and eight cents for fare.

Chapter 770 of the Laws of 1865 authorized the Herkimer, Mohawk and Ilion Railroad to charge a fare of not exceeding twenty cents for any distance over the road, and not more than ten cents between Herkimer and Mohawk or between Mohawk and Ilion.

Chapter 34 of the Laws of 1866 amended the act of 1864 relating to the Dunkirk and Fredonia Railroad so as to permit it to charge a fare of ten cents for riding half the length of the road or less, and fifteen cents for more than half the distance of the road.

Chapter 110 of the Laws of 1866 authorized the Kingston and Rondout Railroad to charge a fare of ten cents between Kingston and Rondout.

Chapter 197 of the Laws of 1866 authorized the Seneca Falls and Waterloo Railroad to charge a fare of twelve cents for riding any distance over the road, but not more than five cents entirely within the limits of either village.

Chapter 334 of the Laws of 1866 authorized the Troy and Albia Horse Railroad Company to charge a fare of five cents for one mile or less, seven cents for more than one mile and less than two miles, and ten cents for two miles or more.

Chapter 368 of the Laws of 1866 authorized the Poughkeepsie

City Railroad Company to charge not to exceed a ten cent fare for any distance within the corporate limits of the city of Poughkeepsie.

Chapter 479 of the Laws of 1866 authorized the Buffalo Street Railroad Company to charge an eight cent fare for passengers on its Main Street line; it also required the company to sell tickets in books of twenty-five each at six cents per ticket.

Chapter 659 of the Laws of 1866 authorized the Horseheads and Elmira Railroad Company to charge a six cent fare in the city of Elmira, and a twenty-cent fare from Elmira to the village of Horseheads.

Chapter 131 of the Laws of 1867 authorized the Niagara Street Railroad in the city of Buffalo to charge a fare of eight cents, and also required it to sell tickets in packages at six cents and some at seven cents.

Chapter 489 of the Laws of 1867 authorized the West Side and Yonkers Patent Railway Company to exact a fare of five cents in the city of New York for any distance less than two miles, and for every additional mile or fraction thereof one cent.

Chapter 565 of the Laws of 1867, creating the Buffalo City Railway Company, authorized it to charge a fare of six cents.

Chapter 906 of the Laws of 1867 provided that every railroad whose road is operated by horse power or steam dummy cars, or partly by each, is required to report to the Legislature annually the rates of fare charged for passengers.

Chapter 414 of the Laws of 1868 authorized the Buffalo and Williamsville Railroad Company to charge four cents a mile or fraction thereof.

Chapter 829 of the Laws of 1868 provided that the Fayetteville and Syracuse Plank Road Company may construct a railroad and collect a fare of five cents per mile.

Chapter 34 of the Laws of 1869 authorized the Rochester City and Brighton Railroad Company to charge a fare of five cents.

Chapter 80 of the Laws of 1869 authorized the Troy and Albia Railroad Company to charge thirteen cents for passage over

[Vol. 14]

Public Service Commission, Second District

the road two miles or more; any distance less than two miles and more than one mile, nine cents; one mile or less, seven cents.

Chapter 553 of the Laws of 1869 authorized the construction of a railroad in the village of Warsaw, and a fare of not more than fifteen cents for any distance over the road, but not more than ten cents for riding half the length of the road.

Chapter 636 of the Laws of 1869 authorized the construction of a railroad in Oswego, and a fare of five cents for any distance under one mile, and for any distance exceeding one mile a fare of ten cents might be charged.

Chapter 654 of the Laws of 1869 authorized the Poughkeepsie City Railroad Company to charge a fare of ten cents within the limits of the city.

Chapter 743 of the Laws of 1869 amended the act of 1864 relative to the Albany Railway Company and authorized that company to charge a fare not exceeding six cents for any distance.

Chapter 367 of the Laws of 1870 authorized the Middletown horse railroad to charge a fare of ten cents within the corporate limits of Middletown.

Chapter 774 of the Laws of 1870 authorized the Buffalo East Side Street Railway Company to charge a fare of six cents, and three cents for transfers under certain conditions.

Chapter 30 of the Laws of 1871 authorized the New York Railway Company to charge a fare of fifteen cents between Chambers street in New York city and the Harlem river.

Chapter 71 of the Laws of 1871 authorized the Troy and Cohoes Railroad Company to charge ten cents from Troy to Cohoes, and eight cents from Troy to Green Island and from Green Island to Cohoes.

Chapter 375 of the Laws of 1871 authorized the Oneida Horse Railway Company to charge a fare of ten cents within the corporate limits of Oneida.

In the year 1871 there were also two special acts passed by the Legislature creating street railroads in the city of Auburn, and providing a fare of not exceeding six cents in the city.

Chapter 370 of the Laws of 1872 required the Buffalo East

Side Street Railway Company to sell tickets at five cents each, and to make a charge for transfers under certain conditions.

Chapter 561 of the Laws of 1872 authorized the construction of a railroad between the village of Watkins and the village of Havana, and a fare of ten cents within the corporate limits of the villages.

Chapter 833 of the Laws of 1872 authorized the Metropolitan Transit Company to construct and operate certain railroads in New York city, and to charge six cents for three miles or less, and two cents for each additional mile or fraction thereof.

Chapter 834 of the Laws of 1872 incorporated the New York City Rapid Transit Company, and authorized it to charge a fare of ten cents for four miles or less, and two cents for each additional mile or fraction thereof.

Chapter 412 of the Laws of 1873 authorized the Fonda, Johnstown and Gloversville railroad to charge a fare of twenty-five cents between Johnstown and Gloversville.

Chapter 141 of the Laws of 1875 authorized the Fonda and Fultonville Horse Railroad Company to charge an eight-cent fare from Fonda to Fultonville.

Chapter 361 of the Laws of 1882 authorized the Buffalo Street Railroad companies to charge four cents for transfers between Cold Springs and the Park.

Practically all of the cases, with respect to franchise conditions imposed by the local authorities which were decided by the courts prior to 1884, relate to street railroads in the cities of New York and Brooklyn. There are none dealing specifically with the question of fare until after that year. After the act of 1884 went into effect, all new street railroads were required to be created under its provisions, and the powers obtained by such corporations were set forth therein as well as the powers which might be exercised by municipalities with respect to such corporations. Section 7 of the act of 1884 relating to the sale of a franchise in a city or village was amended by chapter 65 of the Laws of 1886 which made this requirement mandatory upon the municipality, and this act of 1886 was in turn amended by chapter 642 of the Laws of 1886 which enlarged in several respects the provisions

[Vol. 14]

Public Service Commission, Second District

relative to these particular matters in the law as it existed after the first amendment was made in 1886. There was no provision in section 13 of the act of 1884 to the effect that the Legislature reserved the right to alter or reduce the rate of fare therein provided, although there was a general reservation of the right to alter, amend, or repeal the act, but in the two amendments just referred to the following clause appears: "The Legislature expressly reserves the right to regulate and reduce the rate of fare on said railroad or railway." This was a notice to the effect that the Legislature did not at any time intend to waive its rights to regulate rates on such a railroad, although, of course, its power in that respect would not have been impaired had such a clause been omitted.

So, therefore, the act of 1884, as amended as hereinbefore indicated, was the general law relating to street surface railroads down to 1890, when another general railroad act was passed, known as chapter 565 of the Laws of 1890. This related to all railroads, and it purported to repeal the act of 1884, and article IV thereof refers to street railways. This act set forth in detail what it was necessary to do in order to form a corporation to construct and operate a street railway, and what it was necessary for the corporation to do in order to be able to build, construct, maintain, and operate such a railway. Section 92 provides that the consent of the municipal authorities "shall be upon the express condition that the provisions of this article pertinent thereto shall be complied with and shall be filed in the office of the clerk of the county in which such railroad is located." It will be noted that this is similar to the provision in the act of 1884.

Sections 93 and 95 set forth certain conditions which may be required by municipalities with respect to the payment of a certain percentage of the gross receipts of a railroad. Section 98 contained a requirement in regard to paving, and authorized the local authorities to make reasonable regulations and ordinances as to the rate of speed, mode of use of track, and removal of snow and ice, as the interests or convenience of the public might require. Section 101 reads as follows:

"Section 101. Rate of fare. No corporation constructing and operating a railroad under the provisions of this article, or of chapter two hundred fifty-two of the laws of eighteen hundred and eighty-four shall charge any passenger more than five cents for one continuous ride from any point on its road, or on any road, line or branch operated by it, or under its control, to any other point thereof, or any connecting branch thereof; and not more than one fare shall be charged for passage over the main line of road and any branch or extension thereof, whereof the right to construct such branch or extension has been acquired under the provisions of such chapter or of this article; but this section shall not apply to any part of any road constructed prior to the sixth day of May, eighteen hundred and eighty-four, and then in operation, unless the corporation owning the same shall have acquired the right to extend such road, or to construct branches thereof under such chapter, or shall acquire such right under the provisions of this article, in which event its rate of fare shall not exceed its authorized rate prior to such extension. The legislature expressly reserves the right to regulate and reduce the rate of fare on any railroad constructed and operated wholly or in part under such chapter or under the provision of this article."

It will be noted that this section is substantially the same as section 13 of the act of 1884, as amended by the acts of 1886, except that the provision restricting the five-cent fare to the area within the limits of an incorporated city or village has been omitted. Section 108 provides that sand may be used on the tracks in cities of more than 500,000 population to prevent horses from slipping, but it does not say that this must be done under the supervision or subject to the regulations prescribed by the municipal authorities. Article V of this act relates to other railroads in cities to be operated by steam, and contains many of the provisions of chapter 606 of the Laws of 1875 which provided for the formation of such railroads, and we only refer to it here for the purpose of calling attention to one or two matters which appear therein. Among other things, certain commissioners can be appointed by the Supreme Court, and they are given power

[Vol. 14]

Public Service Commission, Second District

among other things "to fix and determine a time when such railway or portions thereof shall be constructed and ready for operation, and the maximum rates to be paid for transportation and conveyance thereon and the hours during which special cars or trains shall be run at reduced rates of fare." These commissioners were also required to prepare a proper certificate of incorporation for the corporation which is to construct, maintain, and operate such a railway "in which shall be set forth and embodied as component parts thereof the several conditions, requirements and particulars by such commissioners determined pursuant to the provisions of this article." These identical provisions are still a part of the Railroad Law of this State and may be found in article 6 thereof.

In 1892 the Legislature enacted chapter 676, amending the Railroad Law. So far as article IV relating to street railroads is concerned, there was no material change made with respect to the powers given to the local or municipal authorities. Section 101, specifying the rate of fare, however, was amended so as to provide that the restriction to a five cent fare should apply within the limits of any incorporated city or village. Before this amendment and subsequent to the taking effect of chapter 565 of the Laws of 1890, there was no such restriction regardless of whether the railroad extended beyond the bounds of a municipality or not.

Section 101 was again amended by chapter 588 of the Laws of 1897 by inserting the provisions relative to the collection of a ten cent fare in a third-class city under certain operating conditions.

Chapter 494 of the Laws of 1901 purported to amend section 93 of chapter 565 of the Laws of 1890, but no additional powers were thereby conferred upon the municipal authorities so far as the fixing of rates of fare as a condition of giving municipal consent is concerned. In fact, no such power is given. The same is true with respect to chapter 475 of the Laws of 1908, which purports to amend section 93 of chapter 565 of the Laws of 1890 as amended by chapters 306 and 676 of the Laws of 1892,

chapter 434 of the Laws of 1893, and chapter 494 of the Laws of 1901.

Chapter 481 of the Laws of 1910, constituting chapter 49 of the Consolidated Laws, entitled "The Railroad Law," contains the various provisions relative to street railroads in article V. Section 172 relating to consent of local authorities is practically the same as the law passed in 1892, and the same is true of section 173 relating to conditions. Section 175 relates to the payment of gross earnings in cities or villages. Section 178 relates to the repair of streets, speed, removal of ice and snow. No additional powers are given in this section beyond those in the former law. Section 181 is the same as section 101 in the act of 1892 in respect to fares, but the provision as to regulation by the Public Service Commission is new. That portion of section 190 providing that the use of salt on the tracks shall be under the direction of the city officials is new.

So we see that section 181 of the Railroad Law as it exists today is substantially the same as the act which was passed in 1884 so far as the requirement relative to a five cent fare within an incorporated city or village is concerned, the essential change being the clause reserving to the Legislature and the Public Service Commission the right to regulate the rate of fare. This brings us down to the present time in a general way in respect to laws which have been passed regarding street railways, without however having given any consideration to the Public Service Commissions Law to which we shall refer later.

One of the first cases decided by the Court of Appeals dealing with the power of a municipality to grant a franchise and set forth conditions therein was that of *Milbau v. Sharp*, 27 N. Y. 611, decided in 1863. This was an action to enjoin the operation of a street railway in Broadway, in the city of New York. On December 29, 1852, the common council of the city of New York passed a resolution authorizing certain individuals to lay a double track of railway in Broadway. Among other things, this resolution or franchise required the payment of certain

[Vol. 14]

Public Service Commission, Second District

license fees for the cars operated on the railroad. There were other requirements relating to the laying of the track, the kind of cars, method of operation thereof, and that no higher rate of fare should be charged than five cents for each passenger. It was claimed by the defendants that the street belonged to the corporation of the city of New York, and that the common council had power to regulate the streets and to authorize the laying of rails therein and to pass the resolution in question. The court below decided as a matter of law that the resolution was not a legislative act but a contract, and was not within the powers conferred upon the common council, and was therefore absolutely void and conferred no authority whatever upon the defendants to establish a railroad in Broadway. In the opinion the court says: "The provisions giving the right to lay the track of the railway, determining its location, width and manner of construction, the quality of the cars, the time of their running, the motive power to be used, the maximum rates of toll to be charged, the amount of license fees to be paid, and the duration of the privileges granted, are all parts of a single scheme, which are incapable of separation. The whole scheme is valid, or not part of it. These privileges, whether they create a monopoly or not, constitute a franchise. The definition of franchise, by Bouvier, is a 'privilege conferred by grant from the government, and vested in individuals.' Kent says (3 Com. 458), 'The privilege of making a road, or establishing a ferry, and taking tolls for the use of the same, is a franchise.' Railroads certainly do not form an exception. (3 Paige, 45; 14 N. Y.) Monopoly is not an essential feature of a franchise. A corporation with banking powers would be no less a franchise, if there were no law restraining private banking, which alone gives to banking corporations the character of monopolies. The granting of franchises was a part of the prerogatives of the British Crown (Finch's law, 164), which, on the severance of the colonies from Great Britain, became vested in the people, and no franchise can be created in this State, without authority to create it derived from the people through the legislature. The

corporation of New York can grant ferries (or at least could do so, prior to the act of May 14, 1845, on the subject), because that power has been expressly granted to it (1 Hoff. Est., and Rights of the Corporation of New York, 285, 281, 286; *Benson v. The Mayor, &c.*, 10 Barb., 223), but neither the corporation nor the common council has been authorized to create a franchise of the character of that described in the resolution under consideration. It follows that the resolution, relating to a subject not within the powers of the body passing it, is merely void.

“On other grounds, without reference to its character as creating a franchise, the resolution is equally objectionable. It was not, as has been insisted, an act of legislation, but on the contrary, it possesses all the characteristics of, and was in fact, a contract. It was held to be a contract in the case of *The People v. Sturtevant* (2 N. Y. 273), and but a slight examination of its provisions is requisite to show the correctness of that decision. Prior to its acceptance by the defendants, the resolution was only a proposition, having no binding force whatever. It was certainly not then a law, and since that time the common council have taken no action upon it. Upon its acceptance (if valid), it became a contract between two parties, binding each to the observance of all its provisions. It was something more than a mere executory contract between the parties. It amounted also to an immediate grant of an interest, and it would seem of a freehold interest in the soil of the streets to the defendants. The rails, when laid, would become a part of real estate, and the exclusive right to maintain them perpetually is vested in the defendants, their successors and assigns. I say perpetually, because there is no limitation in point of time to the continuance of the franchise, and no direct power is reserved to the corporation to terminate it. Indirectly such termination might, perhaps, be effected, after the expiration of ten years, by making the exercise of the privileges so burdensome through the increase of license fees as to compel their abandonment. This, however, could only be accomplished through the aid of state legislation; and if we assume that

the laws of the State in that respect are to remain unchanged, the privileges granted are perpetual. The title to the rails when permanently attached to the land, and such right in the land as may be requisite for their perpetual maintenance, are therefore granted to the defendants by the resolution. The exclusive use of the rails when laid for the purpose for which they were designed, would also, as I think, belong to the defendants. Other people might drive across them and to some extent along them, with ordinary carriages, but they would have no right to run cars upon them for their own convenience or profit. Any use which the public could have of them, not exercised through the defendants' franchise, would depend upon the fact that the rails would not entirely exclude from the ground they might occupy, the character of a public street. The public might continue to pass over the track (when not in use by the defendants), but that must be done with such inconvenience, more or less, as the rails might occasion. No direct benefit could be derived by the public, or by individuals not interested in the road, from its construction, otherwise than through the use of the cars to be run upon it. Indirectly, other benefits might arise, and possibly of sufficient magnitude to overbalance the inconvenience arising from its construction and use. Whether this would be so or not, is a question the solution of which does not belong to this tribunal and I should express no opinion in regard to it if I had formed any. So far as that question is involved in the present case, it is already conclusively determined against the defendants, and my present purpose is only to show the importance, the exclusive character, and the permanency of the powers conferred, or attempted to be conferred, upon the defendants by the resolution. If that resolution should be sustained, no power would remain in the corporation to remove the railway after its construction, if it should prove to be a nuisance, *or to reduce the rate of fare, if it should be found unreasonably high*, or to compel the introduction of any improved method of conveyance, if at any future time such method should be invented, without the consent of the defendants or their successors; and the powers of the corporation over

the street in many other respects would be abridged. Those powers were given to the corporation as a trust, to be held and exercised for the benefit of the public, from time to time, as occasion might require, and they could neither be delegated to others, nor effectually abridged by any act of the corporate authorities. (The People v. Kerr, 27 N. Y. 188; Presbyterian Church v. Mayor, &c., 5 Cowen 538; Coates v. Mayor, &c., 7 id. 585; Goszler v. Corporation of Georgetown, 6 Wheat. 593.) Such trust is, in this respect, governed by the general principle, that the duties of a trustee cannot be delegated without express power for that purpose conferred by the author of the trust. (Hill on Trustees, 175, 540, Phil. ed. 1846.)

"The defendants' counsel insists that the resolution is not a contract, but a license, revocable at the pleasure of the common council. This position cannot be reconciled with the decision in *The People v. Sturtevant*, *supra*, nor with the principle declared by the Supreme Court of the United States in the Dartmouth College case (4 Wheat. 519), and other kindred cases, in substance, that grants of such franchises, though made by acts in form legislative, become, when accepted and acted upon, contracts, not subject to be recalled or modified; except in accordance with express reservations contained in the grants. No such reservation is made by the resolution in question, and the privileges which it grants, if within the power of the common council, are already beyond the control of any future act of that body. (Smith's Com., sections 252, 253.) No reservation of that kind, however, would have been of any service, as it could not supply the defect of power. The resolution is, therefore, void, for the reasons that it purports to create a franchise which the common council had no power to create; to vest in the defendants an exclusive interest in the street, which the common council had no power to convey; and to divest the corporation of the exclusive control over the street, which has been given to it as trust for the use of the public, and which it is not authorized to relinquish."

In 1886 the matter of Thirty-fourth Street Railroad Co., 102 N. Y. 343, was decided. That was an appeal from an order

[Vol. 14]

Public Service Commission, Second District

of the General Term denying the application of the railroad company for the appointment of commissioners to determine whether its proposed road ought to be constructed pursuant to the provisions of chapter 252 of the Laws of 1884. Counsel for the railroad company claimed that the Legislature had no right to insert conditions in the act beyond those set forth in article III, section 18, of the Constitution. The court in passing upon this question decided that while the Constitution sets forth certain restrictions upon the Legislature with respect to the granting of franchises to street railways, yet the Constitution does not by express language or implication abridge the legislative power over the subject except in the manner set forth therein, and that except as restricted by the Constitution the legislative power is untrammelled and supreme, and that a constitutional provision which withdraws from the cognizance of the Legislature a particular subject or which qualifies or regulates the exercise of legislative power in respect to a particular incident of that subject leaves all other matters and incidents under its control, and that nothing is subtracted from the sum of legislative power except that which is expressly or by necessary implication withdrawn. Also that the Legislature is prohibited from granting a franchise to construct a street railroad except upon certain specified conditions and that it is not prohibited from annexing further conditions not inconsistent therewith, and whether other conditions are necessary or proper is a matter resting in the wisdom and discretion of the Legislature. To the same effect is *Bohmer v. Haffen*, 161 N. Y. 390-412, decided in 1900.

In 1888 the General Term decided the case of *People ex rel. West Side Railroad Co. v. Barnard*, 48 Hun, 57. This was a proceeding to compel the comptroller of the city of Buffalo to accept a bond executed by the relator and tendered to him in compliance with the statute requiring the same in connection with the purchase of a franchise in the city of Buffalo by the relator. While the issue in the case was really in respect to the bond, yet the court took occasion to say that the common council exceeded its authority in making it a condition to giving its consent for the

construction of the road that the company seeking the privilege should carry passengers beyond the lines mentioned in its articles of association. Also that the Legislature had expressly reserved to itself the right to regulate and reduce the rate of fare on all railroads under the provisions of the general act relative to street railroads, and that the common council had no power whatever to interfere with the same. This case was reversed in the same year by the Court of Appeals in *People ex rel. West Side Street Railway Co. v. Barnard*, 110 N. Y. 548, on the ground that the comptroller should have accepted the bond tendered by the company as it contained all the conditions required in the statute. While it has been vigorously asserted that this case was decisive of the proposition that the common council of a city has the right to fix the rate of fare on street railways therein, yet we can not agree with this contention. The court did not decide that the company could never charge more than five cents for a single fare, or that the common council could as one of the conditions for granting the franchise fix the amount of fare to be charged by the company. The court says, referring to chapter 642 of the Laws of 1886, which is an amendment to chapter 252 of the Laws of 1884, the general act authorizing the construction of street railroads:

“Under this act and under the constitutional provisions applicable to the construction of street railways, the municipal authorities have the absolute power to grant or withhold their consent to the construction of street railways; and they may impose any conditions however onerous or difficult to perform which seem to them in the exercise of their discretion to be proper as the terms upon which their consent will be given.”

In the notice of sale of the proposed franchise in this case various conditions were set forth, among others the following:

“Second, That the purchaser as heretofore specified shall charge no greater than a five cent fare for one continuous passage from Seneca street along Main street and over the route specified in this grant to Forest avenue.”

After the relator had purchased the franchise at public auction, the comptroller of the city caused to be prepared and presented to

[Vol. 14]

Public Service Commission, Second District

the relator for execution a bond containing the conditions prescribed in the statute, and many other conditions. The relator refused to sign it, claiming that it contained conditions not authorized by the statute. It then prepared and submitted a bond to the comptroller which did contain the conditions set forth in the statute as well as some others. The comptroller refused to accept the bond on the ground that it did not contain all the conditions in the bond presented by him for execution. In answer to this the court said: "We are of the opinion that the comptroller was bound to accept and approve the bond. It contains all that the statute requires and *he had no right to exact any other conditions*. He did not object and could not object to other conditions contained in the bond. His sole objection was that some conditions were omitted from the bond which he determined ought to be contained therein. The conditions, aside from those required by the statute for the payment of a percentage of gross receipts and for the commencement and completion of the road within the prescribed times, were harmless, not illegal or against public policy, but were mainly if not exclusively conditions for the performance of such things as the law without any agreement whatever required the relator to observe and perform."

Further along in its opinion the court says: "It has been said that the action of the common council was illegal and void because it required the purchaser of the franchise to carry passengers from Seneca street through the route specified in the grant for a single fare of five cents for one continuous passage. The resolution undoubtedly required the railway company taking the grant to carry passengers to and from points beyond one of its termini. This was a condition which it could impose. It might be difficult for the company taking the grant to perform it but it was not impossible to perform it because under the statutes there was a way by which the relator could obtain the right to run upon the tracks of the East Side Street Railway Co. which owned the road between Seneca street and one terminus of the route granted."

The question of the amount of fare to be charged by the railway was not an issue in this case. The matter under considera-

tion was whether or not the comptroller should be required to accept the bond tendered by the company. And that the court did not intend to hold that the common council of the city had a right to fix the amount of fare is borne out by the headnote of the case which reads as follows: "The common council required as a condition to its consent that the purchaser of the franchise should carry passengers *for a single fare* to and from points beyond the termini of the proposed road over the road of other street railways. *Held*, That this was a condition the common council had a right to impose."

So we think it can be fairly said that the court did not attempt to decide that the rate of fare was fixed for all time but that a single fare only could be charged over the route mentioned regardless of what the amount might be, that being clearly a matter for legislative determination, no claim being made that such power had been delegated to the city by the Legislature.

A case directly in point with the one we have just been considering is that of *Gaedeke v. Staten Island Midland R. R. Co.*, 43 App. Div. 514, which arose out of certain conditions as to fares which were inserted in franchises granted to the railroad company. The decision in the *Gaedeke* case rests entirely on the *Barnard* case and the statement therein contained with reference to the right of the local authorities to fix conditions as to fares. But we do not consider that this case is decisive of the question as to whether or not the local authorities have the right to fix the fare by the insertion of a condition in a franchise so as to take away the power of the Legislature or this Commission to determine what is a just and reasonable fare, for that is directly contrary to the decisions of our highest court. The *Gaedeke* case arose out of the failure of the company to carry passengers in accordance with the provisions of the franchise and was an action entirely between the municipal authorities and the corporation. The State was not a party to the action, and the question was not whether the condition in the franchise which had been accepted by the corporation was valid and binding as against the State but only as between the parties, and the court held that it was.

[Vol. 14]

Public Service Commission, Second District

The Barnard case, as we have stated, did not decide that a fare of no more than five cents could be charged in the city of Buffalo, but on the contrary that a passenger should be carried for a single fare, leaving the final determination as to the rate of that fare in the hands of the Legislature. It is asserted that the case of Public Service Commission, Second District v. Westchester Street R. R. Co., 206 N. Y. 209, taken in conjunction with the Barnard case and the Gaedeke case, is conclusive upon the question of the right of a municipality to fix the fare in a franchise. While a casual reading of this Westchester case might lead to that conclusion, yet we think it can be readily distinguished from the cases which hold that municipalities have no right to fix conditions other than those they are empowered to fix by the Legislature. While it is true the Westchester case makes certain allusions to the question of a five cent fare, yet the matter under discussion was whether or not a purchase of street railroad franchises at foreclosure sale is bound by the provisions of the franchise so far as the rate of fare is concerned. This also was a case in which the State was not a party except as it appeared by the Public Service Commission in an effort to compel the corporation to observe the provisions of the franchise. It was not a case in which the railroad company was seeking in the manner provided by statute for an increase in fare so as to enable it to earn a reasonable return upon its investment, but the question involved was solely as to whether or not the franchises were binding as between the municipality and the corporation which had acquired them from the purchaser at foreclosure sale. What the court did decide was that the statute authorizes a proceeding of this character to compel the corporation to comply with the obligations imposed by the contract made with the municipality even though it might be unprofitable; and that even though sound public policy might not be best subserved by compelling a public service corporation to furnish service even at a loss, yet that proceeding was not the one in which it would be proper to undertake to give relief. In other words, a proceeding to compel the observance of the law was not a proper proceeding in which to begin an investigation into the question

of the reasonableness of rates. We think that the view that the case was not conclusive upon the right of the municipality to fix the rate of fare is entirely proper when the record of this case is carefully considered. In addition to this, the court said, in discussing the fare fixed in the franchise:

"It seems to me that thereby the old franchise was presently and effectively modified or superseded by the new contract so far as the village authorities were interested in and could contract for a reduced fare. It is not necessary here to determine whether the latter could contract for a reduced fare on a continuous passage between White Plains and some point short of or beyond the village."

This would seem to indicate conclusively that the court was not attempting to decide that the village authorities as against the State could limit the fare but that the franchise conditions were binding on the parties until such time as some higher authority should intervene to regulate them. It is true that the court said, at page 217: "There is no doubt that the rate of fare to be charged to and from points in the village was a matter of such municipal and public interest that the municipal authorities might bargain with reference thereto. Therefore the grant of the new franchise on the condition and consideration, amongst others, of a five cent fare between the points now involved and the acceptance by the company thereof and its agreement to observe all the 'conditions, regulations and restrictions' thereof made a valid contract."

It is asserted that this creates a situation where the Legislature has no further power in respect to rates to be charged in these communities by the railroad. It is inconceivable that this was intended by the court because of the many decisions which it had made in previous years to the effect that municipalities in this State had no such power. The only power given to municipalities with respect to street railways is that contained in the Constitution, article III, section 18, and in the acts passed by the Legislature, and at no time, at least since 1884, has any express power been conferred upon municipalities to fix rates of fare on

[Vol. 14]

Public Service Commission, Second District

street railways. If we should accede to the interpretation of this decision which has been urged upon us, we should have to disregard all the decisions of the Court of Appeals as well as those of the Supreme Court of the United States to the effect that municipalities can not barter away the right of the State to regulate rates, which is a part of its police power, unless they are given explicit authority so to do. Certainly there was not presented in the Westchester case any evidence that such power had been given to the municipalities involved. Then again, if it should be said that the court intended to reverse all of its previous determinations upon these matters as well as to go counter to the decisions of the Supreme Court, one of which related to the precise question here involved (*City of Rochester v. Rochester Ry. Co.*, 205 U. S. 236), we venture to say that the court would at least have made reference to some of the many cases which it proposed to overrule. This was not the intention and it was not done, and we believe that the determination made in the Westchester case is easily reconciled with all of the others which have dealt with the important question now under consideration.

In the same year that the decision was made in the *Barnard* case, the same Court rendered its decision in the case of *Buffalo East Side Railroad Co. v. Buffalo Street R. R. Co.*, 111 N. Y. 132. The parties to that action entered into a contract relative to the amount of fare which each should charge in accordance with the authority given by chapter 474 of the Laws of 1874. Subsequently the Legislature enacted chapter 600 of the Laws of 1875 requiring the street railways in Buffalo to sell tickets to passengers on their respective roads for five cents each. Thereafter the plaintiff brought a suit against the defendant company for a penalty because of the violation of the contract, it having reduced its fares to five cents in accordance with the provisions of the act in relation thereto. The court held that the contract was not binding after the passage of the act of 1875, and that this act was a valid exercise of the legislative power and did not impair the obligations of the contract. In its opinion the

court says: "The same authority which confers upon one body the power of legislation authorizes its successors in the exercise of their duty to change, alter and annul existing laws when in their judgment the public interest requires it. In the performance of their duty of legislating for the public welfare, each successive body must from necessity be left untrammelled except by the restraints of the fundamental law and when called upon to act upon subjects which concern the health, morals or interests of the public as affected by the public use of property for which compensation is exacted by its owners, they are unlimited by constitutional restraint. It is unnecessary to discuss this proposition with much fullness as it was stated by the appellant upon the argument and it is repeated in its printed brief that the authority of the Legislature in the exercise of its police powers could not be limited or restricted by the provisions of contracts between individuals or corporations." (Citing cases.)

We think this shows clearly and conclusively that the court did not attempt nor intend to decide in the Barnard case that the common council of the city had the power to make contracts fixing fares to be charged for transporting passengers on street railways.

In *Mayor v. Dry Dock, East Broadway and Battery Railroad*, 133 N. Y. 104, decided in 1892, the question at issue was whether or not the common council of the city of New York had the right to pass an ordinance relative to the operation of cars, the charter of the corporation setting forth that the construction and operation of the road should be subject to such reasonable rules and regulations as the common council of the city might prescribe by ordinance. The court decided that the company had a right to show that the ordinance was unreasonable and that the municipal authorities could only exercise such authority as had been delegated to them by the Legislature.

Again, in *Adamson v. Nassau Electric R. R. Co.*, 89 Hun, 261, decided in 1895, the court said: "The power to grant or withhold consent to the construction of a street railroad does not emanate from the Legislature, but is devolved upon the municipal authorities by the Constitution. (Art. 3, section 18.) The pro-

[Vol. 14]

Public Service Commission, Second District

vision of the Constitution is a restriction upon the Legislature and forbids the enactment of any law authorizing the construction or operation of a street railroad, except upon the consent of the local authorities having control of the street or highway upon which it is proposed to construct the road. The power thus given is governmental, and to the extent that it is held and exercised, the local authorities are clothed with sovereignty, and are as independent in its exercise as is any other department of the government. * * *

"Whether the right to grant consent to the use of the streets can be deemed the property of the city within the meaning of the acts of the Legislature authorizing taxpayers' actions, would seem not to be a very pertinent inquiry in view of the constitutional provision empowering the common council to do the very thing complained of. But the contention that the right to grant the consent to operate a street railroad is property of the city cannot, I think, be sustained. The law is quite well settled that a municipal corporation has no private estate or interest in the public streets within its borders. While it is said to hold the title to the bed of the streets, its title is that of a trustee for the people of the whole State. This was expressly decided in *People v. Kerr* (27 N. Y. 188), it being there said by Judge Wright that the trust of the city was *publici juris*, held not for the benefit of the people of the city alone, but for the people of the whole State, as the agent of the State and a part of its governmental machinery. * * * This rule has, since that case was decided, repeatedly been stated by the Court of Appeals.

"The absolute control of the streets and the direction as to their use are in the Legislature. The constitutional provision which requires the consent of the local authorities to the construction and operation of a street railroad has not abridged this legislative power. It has only qualified or regulated it. The Legislature may still grant the use of the streets subject only to the condition that the consent of the local authorities be obtained before the road is constructed or operated. The franchise proceeds from the Legislature, and the obtaining of the consent of the local authorities is the performance of a condition without which the road

cannot be constructed. (Matter of 34th Street R. R. Co., 102 N. Y. 343.)”

The case of *Beekman v. Third Ave. R. R. Co.*, 13 App. Div. 279, decided in 1897, relates to the sale of a franchise in the city of New York pursuant to the conditions set forth in section 93 of the Railroad Law. This case was affirmed in 1897 in *Beekman v. Third Ave. R. R. Co.*, 153 N. Y. 144. In its decision the court says: “The authority to make use of the public streets of a city for railroad purposes primarily resides in the State, and is a part of the sovereign power, and the right or privilege of constructing and operating railroads in the streets, which for convenience is called a franchise, must always proceed from that source, whatever may be the agencies through which it is conferred. The use or occupation of the streets for such purposes without the grant or permission of the State through the Legislature constitutes a nuisance, which may be restrained by individuals injuriously affected thereby. (*Fanning v. Osborne*, 102 N. Y. 441.) The city authorities have no power to grant the right except in so far as they may be authorized by the Legislature, and then only in the manner and upon the conditions prescribed by the statute. (*Davis v. Mayor*, 14 N. Y. 506; *Milhau v. Sharp*, 27 N. Y. 611; *People v. Kerr*, id. 188.)

“The power of the Legislature to authorize the grant of such a franchise by local authority is limited by the Constitution and forbidden, except in cases where the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having control of, that portion of the street or highway upon which it is proposed to construct or operate such railroad, be first obtained. (Art. 3, section 18.) The Legislature, however, in virtue of its general power over municipalities, may regulate the mode and manner in which such consent shall be given by the authorities having the control of the street, and may prescribe the conditions upon which it may be given, and all these matters have been regulated by statute. (Laws 1892, chs. 306, 676; Laws 1893, ch. 434.) * * * In conferring the franchise upon the defendant to operate a railroad in the street designated, the

[Vol. 14]

Public Service Commission, Second District

common council did not act in the exercise of any natural or inherent power pertaining to the city, but under delegated powers, to be used and exercised for public purposes, and, in order to vest the defendant with the right claimed, it must appear that there was a substantial compliance with the provisions of the statute."

The court also holds that the local authorities have no power to add to or take from the monetary conditions set forth in the statute, which having been prescribed by law can not be changed by agreement with the local authorities; that the public agencies entrusted with the power and duty to convey the franchise can not permit their action to be influenced by the offer of pecuniary benefits beyond that fixed by law; also that the words "further conditions," referred to in the statute, do not authorize the local authorities to attach additional monetary conditions to the consent; and that the statute having provided that the sale should be made to the corporation agreeing to pay the largest percentage of its gross receipts, the local authorities can not enlarge the condition by requiring in addition the payment of a gross sum, and their power in that regard is not affected by the fact that the applicant offers to pay such sum in addition to the percentages. Further along in its opinion the court says: "The fifth question relates to the validity of another of the conditions expressed in the resolution of the common council expressing the consent. The condition is in these words: '*No passenger shall be charged more than five cents for a continuous ride from or to the above branch or extension.*'" The language of the statute is that "*such consent shall provide that but one fare shall be exacted for passage over such branch or extension and over the line of road which shall have applied therefor.*" It will be seen that the condition does not literally comply with the statute. When it is subjected to a narrow or technical construction it relates to the fare for passage over the old road or main line and leaves that over the contemplated branches or extensions untouched. But it is quite evident when all the conditions are read together, as they should be, that the common council intended to comply with

the statute. One of the conditions contained in the resolution giving the consent provided that "all laws or ordinances now in force, or which may be modified or adopted, affecting the surface railroads operating in this city, shall be strictly complied with and especially article four of the General Railroad Law."

"We have seen that the proposed branches or extensions, by whatever corporation constructed, operated or owned, were to become and remain, by force of the statute, branches or extensions of the defendant's system. *The obvious meaning of the statute is, that in such cases the public should be entitled to passage from point to point over or upon the branches and the main line for a single fare.* In so far as concerns the rights of the public and the obligation to pay fare, the original line and branches are treated by the statute as one road, upon which but one fare could be charged. If the common council had wholly omitted to insert this condition in the resolution, it is not likely that the consent would, for that reason, be held to be invalid, since the statute would impose the condition upon the railroads and render the exaction of more than one fare under such circumstances unlawful. The conditions, fairly construed, provide, in effect, that but one fare shall be charged for a continuous passage over the main line and the contemplated branches or extensions; and so, we think, that there was in this respect a substantial compliance with the statute. * * *

"While the franchise to use public streets for railroad purposes can vest in the corporation only after a substantial compliance with all the provisions of the statute, yet a mere inadvertence in the use of words will not invalidate the grant when it is apparent upon reading all the proceedings and all the conditions of the consent, that every benefit to the public which the statute contemplates has been secured or provided for. The language of the condition as to a single fare, while perhaps open to some criticism if it stood alone, yet, when read with all the other conditions and with the statute which are made a part of it by reference, secures to the public every right which the law contemplated."

In 1905 the Court of Appeals decided the case of *City of Rochester v. Rochester Ry. Co.*, 182 N. Y. 99, which was subsequently affirmed in 205 U. S. 236. In that case the city of Rochester sought to compel the Rochester Railway Company to pay certain assessments for paving between its rails and outside thereof pursuant to the provisions of the Railroad Law. The predecessor of the Rochester Railway Company was the Rochester City and Brighton Railroad Company, which was incorporated in 1868, it having been organized to operate the railway which had been built and operated by another corporation of the same name which was organized in 1862 under the provisions of the general railroad act of 1850 (chap. 140).

The consent given by the city to the original company to construct, maintain, and operate a railroad in the streets of the city contained several conditions. The predecessor of the present company, claiming that the ordinance under which the road was originally built contained certain conditions which were too onerous, asked the common council to afford it some relief therefrom. As a result, the common council in 1869 passed a new ordinance, which among other things fixed a fare of five cents for adult passengers and three cents for children, and also purported to relieve the company from certain paving obligations for a period of five years. This ordinance was accepted by the company. Thereafter in 1869 the Legislature passed an act in effect confirming the agreement between the parties. No claim was made by the city that the railway company was obligated to pay for all street paving between its tracks until March, 1897. Thereafter and in 1901, pursuant to an act of the Legislature, the city and the company entered into an agreement with respect to paving in streets in which the company had built tracks since 1884, when the general act relative to street railroads was enacted, it being understood that the question as to the obligations of the company to pay for pavement in streets where its tracks were built prior to that time should be litigated and determined in a court having jurisdiction. It was claimed by the company that the act of 1869 constituted an agreement which could not be impaired by an act

of the Legislature and that under its provisions the corporation was not obligated to pay for paving in streets where its tracks were laid before 1884.

The court held that the Railroad Law of 1850 required the consent of a municipality to the construction of a street surface railroad through its streets, and that regardless of the conditions which might have been attached to the consent of the municipality in the present case, it had no power to contract away or limit the taxing or police power of the Legislature. It also decided that the rights and immunities of the company must be determined under the act of 1850 pursuant to which the predecessor corporation was organized, and that this act gave no exemption from the future exercise by the Legislature of either the taxing power or the police power.

The court also said; "In the exercise of the police power, the Legislature could prescribe the maximum fares to be charged by the company (*Buffalo E. S. R. R. Co. v. B. S. R. R. Co.*, 111 N. Y. 132; *Railroad Commission Cases*, 116 U. S. 307; *Norfolk & Western R. R. Co. v. Pendleton*, 156 U. S. 667) and such right was reserved by section 23 of the statute subject to the qualification that the fare should not be reduced so that the net returns to the company should be less than ten per cent on the sum actually invested. So equally in the exercise of the taxing power it could relieve the company from the burden of any provisions imposed on it by the ordinance of the common council in 1862. (*Worcester v. Worcester St. Ry. Co.*, *supra*.) Neither of these powers was necessarily to be exercised once for all. Unless contracted away the right to their exercise was continuous and statutes passed under them could be varied or altered from time to time. * * *

"If I am right in the position that the Legislature could have enacted the statute of 1869 so far as its provisions are under examination here, without any assent from the railroad company, then had the act concluded, 'this statute is passed in the exercise of the powers of taxation and police and not as a grant,' it could not well be contended that the railroad company acquired thereby

[Vol. 14]

Public Service Commission, Second District

any contract or property right. I imagine that a continuous power vested in the Legislature may be exercised and its exercise recalled or modified as well by special legislation as by general legislation if no provision of the State Constitution forbids, which was the case in 1869. If to-day a statute were passed repealing section 98 of the present General Railroad Law and enacting that street railroad companies shall not be compelled to pay any portion of the expense of paving the streets within their tracks, will it be denied that subsequently the Legislature might change that policy and impose on the companies a burden of which it had previously relieved them? If this be so, why equally may not the Legislature relieve to-day a particular railroad company from that burden and next year reimpose the burden upon it?"

While this is the only case in this State to which our attention has been called, dealing with the power of a municipality to fix conditions in a franchise and to divest the Legislature of its rate-making powers, which has been passed upon by the Supreme Court of the United States, yet the principle which is involved has been considered by the courts in many of the States as well as by the Supreme Court. It may not be out of place to refer to some of them at this time.

In *Detroit v. Detroit Citizens St. Ry. Co.*, 184 U. S. 368, it was held that the Legislature might authorize a municipality to fix the rate of fare on a street railway for a definite period and that during that time the Legislature could not change or alter the fare and that could only be done by consent of the corporation and the city, but that a city cannot so fix fares without explicit authority from the Legislature. To the same effect are *Minneapolis v. St. Ry. Co.*, 215 U. S. 417; *Home Tel. & Tel. Co. v. Los Angeles*, 211 id. 265; *Milwaukee E. R. & L. Co. v. R. R. Com.*, 238 id. 174; *Detroit United Ry. Co. v. Michigan*, 242 id. 238; *Puget Sound L. & T. Co. v. Reynolds*, 37 Sup. Ct. Rep. 705; *Arlington Board of Survey v. Bay State Ry.*, 244 Mass. 463; *Bay State Railway Rate Case*, P. U. Rep. 1916 F. 221; *Denver, etc., R. Co. v. Englewood*, P. U. Rep. 1916 E. 134.

In view of the numerous decisions from which we have quoted

at length we think it is settled beyond question that municipalities have no right to impose conditions in franchise other than those which the statute gives them the power to exact. The fact that conditions restricting the fare within the municipality are imposed in a franchise does not deprive the Legislature of the supreme power to determine what conditions shall be imposed upon a street railroad corporation. There is no decision in any of the courts of the State which attempts to hold that the Legislature in the enactment of general laws governing the creation and operation of railroads, whether street surface or otherwise, has in any respect conferred upon the municipalities the power to fix a rate of fare in a specific amount. It has delegated the power at different times to fix maximum rates, but this was always subject to the right of the Legislature to intervene and revise and alter such rates as might be fixed under the delegated power. As further illustrating that the municipalities never had any power to exact conditions beyond those prescribed by the Legislature, we will call attention to the case of *New York Cable Co. v. Mayor, etc., of New York*, 104 N. Y. 1, reference to which has heretofore been made. In this case the commissioners appointed under the provisions of chapter 606 of the Laws of 1875 attempted to exceed the powers which were given in the act under which they were appointed, and the court held that powers beyond those authorized by the statute could not be conferred upon the railroads; and that on the other hand, conditions beyond those covered by the statute could not be imposed. A case along the same lines was decided in 1887, *Matter of Kings County Elevated R. R. Co.* 105 N. Y. 97, in which it was decided that the common council of the city of Brooklyn had no power to impose conditions in a franchise or consent to the operation of a surface railroad which related to matters which were under the entire control of the Legislature and the commissioners appointed under the provisions of chapter 606 of the Laws of 1875.

We believe that all of the cases dealing with fare conditions in franchises can be harmonized without difficulty. It will be remembered that beginning with the act of 1884 relating to street

railroads there was and has been a specific provision in the law requiring the consent given by the municipality to contain a clause setting forth that it is given upon the express condition that the provisions of the act relative to railroads shall be complied with. Therefore, even though the municipality should give its consent to the construction, maintenance, and operation of a street railroad in the public streets without attempting to set forth the condition in the franchise relative to fare which is contained in the statute, nevertheless the provision of the statute is binding upon the corporation, and no greater force or effect is given to it and no greater obligation is placed upon it than that which appears in the statute in this respect. The mere reiteration of this condition in the franchise given by the municipality does not place an additional burden upon the corporation, nor does it operate to divest the State of any power which it may have and which it has always had to regulate the fares on street railroads. Some of the franchises involved in the present case, as well as others which have been brought to the attention of the Commission in similar cases, use almost verbatim the words of the statute with respect to the five cent fare, and we think that notwithstanding this provision has been embodied in a written agreement between a municipality and a street railroad corporation it only remains in full force and effect as against the State so long as the Legislature or the Commission takes no action in regard to the increase or reduction of such fare. Certainly the fact that such a provision was contained in an agreement between the parties could not operate to deprive the State of its sovereign rights without its consent as evidenced through some act of the Legislature. It is worthy of note that in the Barnard case the requirement as to the five cent fare was more or less set forth in the words of the statute; and the same is true in regard to the Beekman case, *supra*, as well as the North Shore case, the Cohoes Railway case, and that of Willcox against the Richmond Light and Railroad Company hereinafter referred to. As we have shown, the courts have decided that the municipalities can not exact conditions beyond those set forth in the statute, and this is as true in respect to the rate of

fare as it is in regard to the conditions which must be observed by both the corporation and the city in connection with the preliminary steps which must be taken before a street surface railroad can be built and operated.

We are therefore of the opinion that notwithstanding the conditions in the several franchises granted to the Huntington Railroad which attempted to fix a five cent fare within certain specified territory, the same was only binding upon the company until such time as the Legislature should intervene for the purpose of regulating this rate of fare, and that this Commission has the power under the provisions of the law which created it to revise the fare fixed in the franchises.

We now come to the consideration of the Public Service Commissions Law and the power of the Legislature and the Commission to permit a street surface railroad to charge a fare in excess of that provided in section 181 of the Railroad Law.

Section 33 permits the Commission to prescribe just and reasonable maximum fares for all forms of reduced rate passenger tickets on steam railroads and street railroads.

Section 49 provides that whenever the Commission shall be of opinion " * * * that the maximum rates, fares or charges chargeable by any such railroad or street railroad corporation are insufficient to yield reasonable compensation for the service rendered and are unjust and unreasonable, the Commission shall * * * determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed notwithstanding that a higher rate, fare or charge has been heretofore authorized by statute."

Subdivision 2 authorizes the Commission to investigate the regulations, practices, equipment, and appliances of a street railroad in respect to transportation of persons and property, and to determine the just, reasonable, safe, adequate, and proper regulations, practices, equipment, appliances, and service thereafter to be enforced and to be observed and used in the transportation of persons and property, and to fix and prescribe the same by order;

and it shall be the duty of every street railroad to observe and obey the requirements of every such order and to do everything necessary to secure absolute compliance therewith by all its officers, agents, and employees.

Section 50 authorizes the Commission to order changes and improvements in road and equipment and additions thereto if in the judgment of the Commission the same are necessary to promote the security or convenience of the public or employees, or in order to secure adequate service or facilities for the transportation of persons or property.

What was the purpose of these sections giving such drastic powers to the Commission and authorizing it to place heavy burdens on the street railroads, unless the Commission was at the same time authorized to give such relief in the way of increased fares as might be necessary to enable the corporation to receive a fair return on the increased investment made necessary by the orders of the Commission? It can not be successfully urged that the Commission has the right to order such improvements in service and equipment as might be necessary for the safety of the traveling public, even though this action on its part might in effect operate to confiscate the property of the corporation, for this is contrary to the law of the land. What then does the law contemplate in this respect? The answer is, that the Commission is empowered to require the corporation to give proper service; and, on the other hand, to require the public to pay reasonable rates for such service. The law as it exists at the present time requires the Commission to determine the just and reasonable rates which will enable street railroads to earn a reasonable return upon the value of the property actually employed in the public service and to provide a reserve for surplus and contingencies.

So we believe it may be said to be settled that the Legislature has full power to delegate rate-making powers to the Public Service Commission, and that the Commission has full power to fix just and reasonable rates for carriers and public service corporations, and that the fixing of rates is a proper exercise of the police power of the State. Trustees of the Village of Saratoga

Springs v. Saratoga Gas, E. L. & P. Co., 191 N. Y. 123 [1908]; People ex rel. C. P. etc. R. R. Co. v. Wilcox, 194 id. 383.

If the Commission could not revise the fares fixed by statute, a corporation could only obtain relief by going to the Legislature, which is not in session usually more than four months of the year, so that during the remaining eight months it would be impossible to obtain any relief from unreasonable rates; and the same is true with respect to the public, no matter how seriously either one might be affected. Now such relief can be obtained during any portion of the year because the Legislature has created a tribunal which is always open for the purpose of affording such relief as the public or the corporations may be entitled to, and this is certainly a great improvement over the situation as it formerly existed when a direct appeal to the Legislature was necessary with all the delay incident thereto.

The Commission decided in 1909 that it had the right to reduce the fare charged on the Ticonderoga Railroad between the village of Ticonderoga and the junction with the Baldwin branch of the Delaware and Hudson Company, 2 P. S. C. 2nd Dist. Reports, 78. The railroad company relied upon section 1 of chapter 4 of the Laws of 1890 as giving it the power to charge the fare which was the subject of the complaint. The Commission held that the power to determine just and reasonable rates had been delegated to it by the Legislature and that it had the power to reduce the fare in question notwithstanding the special act of the Legislature, and that one of the purposes of the Public Service Commissions Law was to vest the Commission with the power resting in the Legislature to investigate and determine the proper charges to be made by railroad companies for the service rendered by them. This determination of the Commission was upheld in the case of People ex rel. Delaware & Hudson Co. v. Public Service Commission, 140 App. Div. 839. The court also held that the special act relating to the fare which might be charged was controlling until such time as the Commission should find that the fare was unreasonable. Since that decision amendments have been made to the law so that at present it undoubtedly

applies to fares which are unreasonable because they are too low and insufficient to yield a reasonable compensation for the service rendered as well as fares that are so high as to be unreasonable in that respect.

In the case of *City of Troy v. United Traction Co.*, 134 App. Div. 756, it appeared that under the city ordinance which constituted the franchise of the corporation and pursuant to which it was operating its cars in the city of Troy, it is obligated to run its cars both ways as often as the public wants and convenience may require, and "under such reasonable directions and regulations as the common council may from time to time prescribe." This Commission made an order requiring a fifteen minute service on the Oakwood Avenue line, and the common council of the city of Troy passed an ordinance requiring a ten minute service on that line. The court held that the Commission had power to make a schedule covering the operation of cars in the city of Troy, and that the common council, regardless of the provisions of the franchise, has no power to change the schedule fixed by the Commission, and that no relief can be had from the order of the Commission except through the Commission or in a proper proceeding to review the order of the Commission.

This case was affirmed by the Court of Appeals in *City of Troy v. United Traction Co.*, 202 N. Y. 333.

In 1913 the case of *People ex rel. Westchester Street R. R. Co. v. Public Service Commission*, 158 App. Div. 256, was decided. This was a case involving an order made by the Commission with reference to the amount of securities which might be issued for property of a street railroad purchased at a foreclosure sale. The valuation of the property as made by the Commission and upon which the securities were authorized was contested. The court in discussing the action taken by the Commission in this matter criticized it because it apparently failed to take into consideration the value which the property might have under rates which might be fixed by the Commission. It seems that the Commission had refused authority to issue securities for the purchase price paid at foreclosure on the ground that the company could not earn a

reasonable return on that valuation because of the restrictions in its franchises which prevented the company operating under the franchise from charging a fare of more than five cents. The court said: "The power of the Public Service Commission to fix reasonable rates involves the right to increase as well as to lower rates. The rates are to be reasonable to the public and reasonable to the corporation." (Citing cases.)

In the case of *Willcox v. Richmond Light & Railroad Co.* and *Staten Island Midland R. R. Co.*, 142 App. Div. 44, decided in 1910, the court held that agreements between local authorities and the corporations relative to fares and transfers pursuant to which the railroads were built and operated which had been accepted and acted upon by each of the parties were enforceable, and that the failure to give transfers as provided in the franchises was a violation of law; and also held that the insertion of the five cent transfer clause was a wise and prudent provision, and the omission of such provision would have worked great injustice to the people. There was no claim made by the corporations in this case that their revenues would be in any way affected by this contract, the case having been contested solely upon the ground that the Commission did not have authority to make an order requiring them to give transfers in accordance with the provisions in the franchise. The opinion of the justice at Special Term upon which the affirmance was based would seem to indicate that the control and regulation of the use of public streets had been delegated to the local authorities to such an extent that they could make any conditions which might to them seem best when granting a franchise to a street surface railroad notwithstanding the specific provisions of the statute with reference thereto. This case was affirmed by the Court of Appeals without opinion, but we think it can be harmonized with the others upon the ground that it was intended to uphold the doctrine that as between the parties the franchise conditions were binding until such time as the police power of the State might intervene.

In *People ex rel. Cohoes Railway Co. v. Public Service Com-*

mission, 143 App. Div. 777, decided in 1911, which was an appeal from an order made by the Commission requiring the company to carry passengers between Rensselaer and Albany for five cents, pursuant to chapter 358 of the Laws of 1905, notwithstanding the franchise granted in 1903 by the city of Rensselaer permitting the United Traction Company to charge six cents between Rensselaer and Albany, the court decided that the Legislature had undoubted authority to regulate and control and fix the rate of fare upon the railroads in this State; that it has this right by virtue of its power to amend its statutes and also by virtue of the provisions of section 101 of the Railroad Law, and that the determination of the Commission should be affirmed.

In 1913 the case of *People ex rel. N. Y., N. H. & H. R. R. Co. v. Public Service Commission*, 159 App. Div. 538, was decided. This was a case arising out of an increase in commutation fares charged by the New Haven Railroad Company in the State of New York. The court says, "If the rate is just and reasonable, the company may demand it even though the Commission is of the opinion that the company is making a financial mistake in asking its just dues." *People ex rel. Del. & Hud. Co. v. Stevens*, 134 App. Div. 99; *affd.* 197 N. Y. 1. "If a reasonable and just rate will be prejudicial to the community, it is unfortunate, but furnishes no reason why the company should be required to render the service at a loss. The rate must be reasonable and fair to the company and the public; the public must not pay too much nor the company receive too little. * * * The Commission has given too much attention to the benefits which the community in and about New York will receive from lower rates without regard to the loss which the company will suffer thereby. While the company owes something to the upbuilding of the community, nevertheless the business offered must at least pay a fair return over actual costs."

The court in effect decided that the Commission has the power to regulate commutation as well as all other rates. To quote the words of Judge Howard in the dissenting opinion, "I concur with Justice Kellogg in his conclusion that the Public Service Com-

mission under section 33 of the Public Service Commissions Law (Consol. Laws, chap. 48, Laws of 1910; chap. 480, as amended by Laws of 1911, chap. 546), also under section 49 as thus amended, has power to regulate rates for the public convenience and welfare, and commutation rates as well as all other rates. The plain language of the statute makes the meaning so apparent that there is no opportunity for judicial interpretation."

While in the case of *People ex rel. Ulster & Delaware R. R. Co. v. Public Service Commission, Second District*, 171 App. Div. 607; *affd.*, 218 N. Y. 642, without opinion, the point at issue here is not decided inasmuch as the case was one relating to increased rates for mileage books, yet we think the principle that was decided in that case applies to the present situation. The court held that the statutory rate was one that was binding upon the railroad until it was changed by the Legislature or this Commission, and while there was some question as to the power of the Commission to increase other rates which had been fixed by statute, we do not think that there can be any question in the present case, because under section 181 of the Railroad Law the Legislature has expressly reserved the right to regulate and reduce the fare, and the same power is given to the Public Service Commission. We are not left in doubt as to the power of the Commission to deal with the question of the fare on street railways, that having been made clear in the statute itself, but we do think the reasoning in the *Ulster and Delaware Company case* applies with equal force here, viz: that the statutory rate fixed by the Legislature is the one binding upon the railroad company until such time as it is changed either by the Legislature or the Commission, and that therefore the Commission can increase this rate if it determines that a fare of five cents is unjust or unreasonable to the corporation. This conclusion is supported by *People ex rel. Bridge Operating Co. v. Public Service Commission, First District*, 153 App. Div. 129. In this case the bridge commissioner of the city of New York had made a contract with the Bridge Operating Company for a period of years covering the operation of cars over the Williamsburg bridge

[Vol. 14]

Public Service Commission, Second District

at a certain rate of fare. An order was made by the Commission reducing and fixing the fares which might be charged by the company. The company contended that the agreement with the bridge commissioner was a valid contract for a term of years, and that neither the Legislature nor the city of New York could lawfully impair or abrogate it. The court in its decision says:

"The right to regulate the fares to be charged by public service corporations is essentially a legislative function, and it may well be doubted whether, in this State, the Legislature may lawfully deprive itself of, or delegate to any other body or officer, municipal or otherwise, the power to bind it for a definite term not to exercise the inherent power to regulate such rates. The Constitution of the State (Art. 8, section 1) provides as follows: 'Corporations, formation of. Section 1. Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the Legislature, the objects of the corporation cannot be attained under general laws. *All general laws and special acts passed pursuant to this section may be altered from time to time or repealed.*' The Railroad Law as it existed at and long prior to the time when the agreement of May 21, 1904, was entered into, contained this provision: '§ 101. Rate of fare.—No corporation constructing and operating a railroad under the provisions of this article, or of chapter two hundred and fifty-two of the laws of eighteen hundred and eighty-four, shall charge any passenger more than five cents for one continuous ride from any points on its road, or on any road, line or branch, operated by it, or under its control, to any other point thereof, or any connecting branch thereof, within the limits of any incorporated city or village. * * * *The Legislature expressly reserves the right to regulate and reduce the rate of fare on any railroad constructed and operated wholly or in part under such chapter or under the provisions of this article.*' (Gen. Laws, chap. 39; Laws of 1890, chap. 565, section 101, as amended by Laws of 1892, chap. 676, and Laws of 1897, chap. 688.) This section was reenacted without change in the present Railroad Law (Con-

sol. Laws, chap. 49; Laws of 1910, chap. 481) which went into effect June 14, 1910, as section 181, except that there was added the following: 'And the public service commission shall possess the same power, to be exercised as prescribed in the Public Service Commissions Law.' The Public Service Commissions Law (Consol. Laws, chap. 48; Laws of 1910, chap. 480) provides: '§ 26. Safe and adequate service; just and reasonable charges. Every corporation, person or common carrier performing a service designated in the preceding section [transportation of passengers or property from one point to another within the State of New York], shall furnish, with respect thereto, such service and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such corporation, person or common carrier for the transportation of passengers or property or for any service rendered or to be rendered in connection therewith, as defined in section two of this chapter, shall be just and reasonable and not more than allowed by law or by order of the commission having jurisdiction and made as authorized by this chapter. Every unjust or unreasonable charge made or demanded for any such service or transportation of passengers or property or in connection therewith or in excess of that allowed by law or by order of the commission is prohibited.' Section 2, referred to in the section just quoted, provides (Subd. 5): 'The term 'street railroad,' when used in this chapter, includes every railroad by whatsoever power operated * * * for public use in the conveyance of persons or property for compensation, being mainly upon, along, above or below any street, avenue, road, highway, bridge or public place in any city,' etc. The Public Service Commissions Law further provides (section 49, subd. 1, as amended by Laws of 1911, chap. 546), 'Whenever either commission shall be of opinion * * * that the rates, fare or charges demanded, exacted, charged or collected by any common carrier, railroad corporation or street railroad corporation subject to its jurisdiction for the transportation of persons or property within the state * * * are unjust * * * the commission shall * * * determine the just and reasonable rates,

fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, *notwithstanding that a higher rate, fare or charge has been heretofore authorized by statute,*' etc. (See also Laws of 1907, chap. 429, sections 2, 26, 49.)

"It seems to be quite clear that the Legislature retains such complete power over the fares to be charged by public service corporations (short of actual confiscation) that an act reducing the fares to be charged by a railroad corporation is valid, even though the original rate has been fixed by law before the road was built. (People ex rel. D. & H. Co. v. Public Service Commission, 140 App. Div. 839.) There seems to be no doubt that the Legislature, by the statutes above quoted, has conferred upon the Public Service Commission authority to exercise the power to fix and regulate fares. The order now sought to be reviewed must, therefore, be considered as if the Legislature itself had, by act, reduced the fares to be charged by the Bridge Operating Company, and the question to be determined is whether or not the license agreement of May 21, 1904, operated to unalterably regulate and fix the fares in question during the term of the license. That question seems to be answered by the case of Richmond County Gas Light Co. v. Town of Middletown (59 N. Y. 228). In that case the Legislature had expressly authorized the town to contract for a supply of gas, and the town had made such a contract for a fixed term of years. Subsequently, and before the expiration of the term of the contract, the Legislature repealed the act authorizing it. It was insisted by the gas company that its contract was protected by the constitutional prohibition against impairing the obligations of a contract. (See U. S. Const. Art. 1, section 10, subd. 1.) The court, however, pointed out that the town could exercise no power in the premises except such as was conferred by the Legislature, and could, by no act of its own, extend or expand the legislative authority. The act conferring power upon the town to contract contained no specification of the time for which such a contract might be made, so that, in undertaking to contract for a definite term of years, the town exceeded its grant of power

from the Legislature. This, it was held, could not be done, the court saying: 'The power so conferred was like the other powers conferred upon the officers of this and the other towns of the State, subject to modification or repeal by subsequent legislation, and that the town auditors could not, by any contract, prevent or at all control the action of the Legislature in this respect.' Referring back to the statutory authority under which the agreement of May 21, 1904, was entered into by the bridge commissioner in behalf of the city of New York, it will be seen that no authority is given to him to fix any specific time during which the fares authorized by him shall prevail. His authority, like that conferred upon the officers of the town of Middletown, was merely to fix the fares to be charged upon a railroad operating over the bridge (Laws of 1882, chap. 410, section 1980), but he was not given power to make a permanent rate or one which should obtain for any definite period. In so far as he undertook to do this he acted without legislative authority, and his act cannot bind or control the power of the Legislature. The Bridge Operating Company and those interested with it were bound to take notice of the limitations imposed by statute upon the commissioner with whom they contracted. Our conclusion, therefore, is that it is within the power of the Legislature, and consequently within the power of the Public Service Commission, to regulate and reduce the fares to be charged by the Bridge Operating Company notwithstanding the ten-year license issued by the bridge commissioner."

Our view that the Commission has power to regulate rates is further supported by the case of *People ex rel. New York & North Shore Traction Co. v. Public Service Commission, Second District*, 175 App. Div. 869, decided in 1916. In this case the board of supervisors of Nassau county and the highway commissioners of the town of North Hempstead granted franchises to the traction company which contained certain conditions, among them being one providing that the fare between Mineola and Port Washington should not exceed ten cents. The company appealed to the Commission for relief against this restriction,

[Vol. 14]

Public Service Commission, Second District

claiming that the fare was insufficient to afford it reasonable compensation for the service rendered and was unjust and unreasonable. The Commission decided that it had no power to authorize an increase in fare because of the restrictions in the franchises. The court decided that the Commission had full power to grant an increase in the fare notwithstanding the provisions of the franchises when necessary to yield a reasonable compensation for the service rendered to the public, and that the local authorities had no power under the statute to regulate the fares to be charged by the company.

It may be claimed that because section 181 of the Railroad Law does not specifically provide for an increase in the rate of fare that therefore the only power of the Legislature or the Commission is to reduce that rate. We think that such a decision would be quite untenable because it would be equivalent to saying that the Legislature is powerless to amend a general law no matter what the necessity might be or how important for the welfare of the public. While we believe that the use of the word "regulate" implies an increase as well as a reduction in fare, yet it may be when the word was first used by the Legislature that it was intended to mean any revision of the fares charged on street railroads, and that the word "reduce" was used to apply to rates charged by street railroads in excess of five cents pursuant to special acts of the Legislature; but in any event it is entirely inconsistent with the Public Service Commissions Law to attempt to hold that the only power given the Commission is to reduce fares on street railroads when the statute particularly imposes upon it the duty to determine the just and reasonable rates which are necessary in order to provide a reasonable return upon the value of the property employed in the public service.

We have not attempted to discuss the power of the Commission to fix a just and reasonable rate provided it is able to resolve the other legal questions satisfactorily, because the decisions of the courts for many years have held over and over again that a public service corporation is entitled to charge rates which will furnish a fair return and it has seemed unnecessary for us to

devote any time to the discussion of that question. The courts are unanimous in holding that the fixing of rates is a part of the police powers of the State and Nation, and that public service corporations are entitled as a matter of right to be permitted to charge such rates as will fairly compensate them for the service rendered.

We have therefore determined that the Commission has power to grant an increase in the rates charged by the Huntington Railroad Company in the villages and towns in which it operates notwithstanding the franchise restrictions as to fare and the provisions of section 181 of the Railroad Law, and we will now proceed to consider the question of fact in this case, viz: whether the rates which the company is now charging are insufficient to yield a reasonable average return upon the value of the property employed in the public service.

The only witness introduced on behalf of the petitioner was its vice-president, Mr. C. L. Addison, who has been more or less familiar with the property ever since it was acquired by the Long Island Railroad Company about the year 1895. He testified that the company had only been able to earn enough to pay operating expenses and taxes in two of the last seven years, viz: in 1910 and 1913, and that the property had cost the company about \$575,000, or approximately \$31,000 per mile; that the road was well kept up and operated as economically as possible; also that the maintenance charges for road and equipment were in no way excessive. The road as originally constructed was a horse-car line about three miles in length, located in and adjacent to the village of Huntington. This portion was constructed of fifty-six-pound rail. The extensions which have been built from time to time are constructed of seventy-pound tee and seventy-three-pound girder rails, the latter type being used in the villages, in which some of the tracks are laid in paved streets. Mr. Addison presented a statement giving a rough estimate of what it would cost to-day to build and equip the property which the company owns, using as a basis the prices for labor and material prevailing in the years 1906-1910 inclusive. This amounted to \$528,352, made up as follows:

[Vol. 14]

Public Service Commission, Second District

Track construction	\$309,472
Power transmission line.....	20,009
Car-barns, power house, substation equipment, etc.....	60,400
Real estate	10,000
Car equipment	70,000
Engineering and superintendence, contingencies, and organization expenses	58,480
	<u>\$528,352</u>

A statement filed by the company shows that it has fifteen cars, of which eleven are for the use of passengers, and of this number five are large double-truck vestibule cars equipped with air-brakes. It is a well known fact that the railroad is operating daily over its entire route and giving service to the public.

The following is an extract from Exhibit No. 4 filed by the petitioner, showing its balance sheet as of June thirtieth for each of the years 1910-1916 inclusive:

BALANCE SHEET

	YEAR ENDED JUNE 30						
	1910	1911	1912	1913	1914	1915	1916
ASSETS							
Cash.....	\$10,479	\$11,981	\$4,533	\$4,634	\$4,643
Other current assets.....	774	285	\$611	672	616	487	\$340
Electric railroad fixed capital.....	555,558	572,719	575,859	575,859	572,559	570,195	574,253
Corporate deficit.....	3,500	6,609	17,880	17,585	24,390	31,269	45,245
Totals.....	\$570,311	\$591,592	\$594,350	\$598,649	\$602,199	\$606,595	\$624,967
LIABILITIES							
Unfunded debt (current liabilities).....	512,811	529,572	528,582	520,130	520,447	520,204	538,727
Funded debt.....	26,000	26,000	26,000	26,000	26,000	26,000	26,000
Account amortisation of capital.....	1,500	5,721	10,268	22,519	25,751	30,890	30,240
Capital stock.....	30,000	30,000	30,000	30,000	30,000	30,000	30,000
Totals.....	\$570,311	\$591,592	\$594,350	\$598,649	\$602,199	\$606,595	\$624,967

It will be observed that the deficit of the company is increasing gradually each year, and that it has a very large floating debt which represents principally advances made by the Long Island Railroad Company for the purpose of enabling the petitioner to make extensions and additions to its property.

The following is an extract from the reports of the company on file with the Commission showing a summary of earnings and expenses of the corporation for the years 1910-1916 inclusive:

YEAR ENDED JUNE 30	Operating revenues	Operating expenses	Taxes	Operating income	Deprecia- tion, ways and structures and equipment
1910.....	\$47,652	\$43,152	\$1,336	\$3,164	\$1,500
1911.....	49,079	47,223	2,869	—1,013	4,221
1912.....	51,518	55,597	5,295	—9,374	5,047
1913.....	51,269	47,238	2,416	1,645	12,251
1914.....	48,155	49,118	3,692	—4,655	4,403
1915.....	48,108	48,871	2,668	—3,431	4,639
1916.....	43,029	49,493	2,670	—9,134	—150
	\$338,840	\$340,692	\$20,946	\$22,798	\$31,911

These figures are illuminating and instructive to say the least. During this period the company has earned \$338,840; its operating expenses and taxes have amounted to \$22,798 more than the revenue, and so there is nothing available for interest on bonds, dividends on stocks, reservation for surplus or contingencies, to say nothing of a return upon the value of the property employed in the public service. It is proper to say that during the period in question the company has accrued a reserve out of its operating revenue to cover depreciation on ways and structures and upon equipment pursuant to its rule relating thereto on file with the Commission. This practice is in accordance with good railroad operation, and nothing has been called to our attention to indicate that the amount of this reserve is in any way excessive. The total amount which has been accrued to this account during the period in question is \$31,911. If no depreciation has been provided for during the period in question, the earnings of the company available after the payment of operating expenses would have been \$9,113. Certainly no one will claim that this is in any respect a reasonable return upon an investment in the public service exceeding \$500,000. As a matter of fact, the company has not earned enough in the past three years to pay interest on its bonds which amount to only \$26,000. No dividends have been

[Vol. 14]

Public Service Commission, Second District

paid on the stock in recent years at least, even though it only amounts to \$30,000.

If the permission of the Commission is given to increase the rate of fare in the villages, it will also result in an increase of one cent in each of the existing fare zones, which are now six in number, and it is expected that the increase in the earnings of the company will be approximately \$8,000 per annum for the entire line. Even this increase will not be sufficient to provide a reasonable return upon the property of the company, but it is realized by those in charge of its operations that there is a limit beyond which fares can not be raised without serious detriment to the property. It was stated on the hearing by Mr. Addison that in his opinion the proposed increase would not operate to deter people from making use of the cars of the company to the same extent as at present. It therefore appears to us as though it had been demonstrated clearly and conclusively that the company is not earning a reasonable return upon the value of the property employed in the public service, and that it should be permitted to file tariffs with the Commission effecting an increase in its fares in the villages in which it operates from five to six cents, effective on five days' notice to the public and to the Commission, and that such tariffs should also provide for an increase of one cent in each of the zones in which the company now operates, so that the fare between the termini of the company will be thirty-six cents where the same is now thirty cents.

VAN SANTVOORD, Chairman (concurring).—I have read the opinions of my four associates upon the legal questions involved in these cases with mingled emotions. Admiration of the learning and industry and respect for the power of ratiocination displayed are linked with amazement at the vast amount of law in respect to the subject accumulated during a period throughout which, apparently, the significance of the decisions was unapprehended by the carrier corporations: while chagrin at the thought that a simple and concise declaration by the Legislature as to its actual intent in delegating various rate-making powers to this Commission would have enabled disposition of these important

cases many months ago, is tempered with satisfaction at the ultimate unanimity of view on the part of this body as to its abundant powers in the premises — albeit all seem moved by a sense of duty to elucidate the considerations which have impressed them, respectively, as compelling the final conclusion. And since this is a time especially when every one is expected “to do his bit,” at the risk of being accused of heaping Pelion upon Ossa — mindful even of the greater danger of inspiring some cynical Corporation Counsel to observe, “Methinks they do protest too much” — I modestly contribute a brief expression of my own views, if only to accentuate the fact that from whatsoever point the subject is approached, the conclusions arrived at by Commissioner Carr, who has written the opinion in the case, are inevitable.

Until the decision of the Court of Appeals in the Ulster & Delaware Case, 218 N. Y. 682, I was firmly of opinion that this Commission was not empowered to authorize a railroad corporation to increase its fares beyond a maximum which had been fixed by statute or by legislative charter. And the views of this Commission, as expressed in the prevailing opinion in the case referred to (P. S. C., 2 N. Y. Reports, Vol. IV, p. 535), were that although the Legislature properly might and as we even had the temerity to urge properly *ought* to clothe this body with unlimited authority to regulate all public service rates, within the recognized rules of law and statutory provisions, it had not done so. But our reasoning in the premises has been declared unsound by both the Appellate Division and the court of last resort, although the decision of the Appellate Division was limited as to its scope to cases of reduced rate fares and it was expressly declared that the decision was not addressed to the question of the authority of the Commission to permit ordinary rates of fare to be increased beyond a statutory maximum. Said the court: “We are simply dealing with the question of reduced rates, to which those words (referring to the suggested restriction of the powers of the Commission to the *reducing* of railroad rates below a statutory maximum) clearly do not apply. I think that one of the purposes of said sections 49 and 33 of the Public Service Commissions Law was to place the question of rate-fixing, so far as

[Vol. 14]

Public Service Commission, Second District

reduced rates at least are concerned, within the power of the Commission and to give it jurisdiction to act without statutory limitation or restraint." *People ex rel. U. & D. R. R. Co. v. P. S. C.*, 171 App. Div. 607-611.

I believe that the spirit of the determination in the *Ulster & Delaware Case* plainly indicates prevailing judicial conclusion that the Legislature has conferred upon this body the broadest authority to regulate all railroad rates. In fact, a painstaking study of the opinions handed down by the Appellate Division in the case referred to (I shall always lament the failure of the Court of Appeals to formulate *its* differences of opinion on the subject) leads me to doubt whether under all the facts, and particularly the circumstances as to legislative intent (to which attention was invited by counsel for the Commission in his brief: see dissenting opinion of Presiding Justice Kellogg, 171 App. Div. 607, 616), the reasoning of the prevailing opinion in that case could be assuredly sustained if the powers of the Commission to permit an increase over statutory maximum fares should be categorically limited to "reduced rate" fares. For this reason, when a carrier within the well-recognized rules of law and the requirements of section 49 of the Public Service Commissions Law (as to reasonable average return upon the value of the property used in the public service, etc.), appears to be clearly entitled to increase its fares in order to earn a living, this Commission would not be justified in declining jurisdiction merely because of the qualifying language used by the Appellate Division in its said opinion.

While I have found more difficulty with the question where, if this Commission is to grant relief, it is a franchise restriction or condition instead of an ordinary legislative act which must be overridden, I am convinced that even under such circumstances it is quite as incumbent upon us to assume jurisdiction. As pointed out by Commissioner Carr in his learned and exhausting brief—fortified by the decisions referred to by Commissioner Barhite—it is and always must be the Legislature which exercises final authority in regulating rates and fares; and authority delegated to a municipality to exercise this purely legislative function must

be considered as forever subject to recall or modification by the final law making power. The legislative right to delegate this power has been authoritatively declared in the Saratoga Gas Company Case, 191 N. Y. 123. I wish I might agree with Commissioner Emmet in his unreserved conclusion that "when the Legislature enacted the Public Service Commissions Law the intention was to delegate all its inherent powers in respect of rate regulation to these newly created regulatory agencies [the Public Service Commissions of this State]. That was the chief reason, as I have always understood, for the creation of the Public Service Commissions." [Concurring opinion herein.] While that indeed may have been the chief justification for the enactment of the Public Service Commissions Law, if such actually was the moving spirit of the legislation, the law making body was singularly remiss and careless in framing the act. The fact that for years the ablest corporation lawyers have at least failed to apprehend that this Commission has been clothed with powers to authorize an increase of railroad fares in disregard of a statutory maximum; that a bare majority of this Commission of five lawyers recently decided that it had no such authority, and that a bare majority of the able judges of the Appellate Division and the Court of Appeals, respectively, held to the contrary; and, finally, that in respect of gas and electric light rates an eminent former justice of the highest tribunal in the land, himself indeed *magna pars* in the original enactment of this very Public Service Commissions Law, has recently declared that the Commissions have no such power — all of these circumstances would seem to indicate the existence of at least a microscopical element of doubt as to the suggested legislative intent. In passing one might be permitted to wonder why the Commissions should have been entrusted with these broad powers in cases of railroad rates, and the authority expressly withheld in cases of gas or electric light rates. Such a manifest discrimination against the lighting companies does not indicate that devotion to the ideal which is supposed to reign supreme in the legislative breast. In fine, while as already observed, all are in accord that the Legislature properly

[Vol. 14]

Public Service Commission, Second District

should (we need not hesitate to dogmatize now that the Investigating Committee has concluded its labors) have embellished this Commission with comprehensive powers in the premises, in the matter of expressing its actual intent I think it must be conceded that the lawmakers have been somewhat coy. But the courts have found an implied decoration, of sufficient substance to invest us with authority; and the wisdom of our ancestors is embodied in the maxim that when the Judges shall have spoken the law is to be deemed unrolled.

Nevertheless, upon the question of jurisdiction in such cases, where franchise restrictions or conditions would, if deemed controlling, prevent affirmative action by this body, I am moved by the same considerations which have lead me to disregard the alleged limitation of the Ulster and Delaware decision to a single form of passenger fares: that the manifest spirit of the courts is to consider that the Legislature has intended to confer upon the Commissions these broad powers of unrestricted rate regulation — to be exercised of course within the well-recognized rules of law and the specified statutory limits as to method, etc.

But while I can not evade this conclusion, I must confess — and it is mainly to create an opportunity to make the confession that I have embarked upon this little dissertation — I protest that it is a shock to be told that a contract as to rates of transportation, solemnly entered into between a carrier and a municipality and deliberately accepted by the former as a consideration exacted for its right to exist at all (always bearing in mind that under the Constitution no power on earth can compel a municipality to give the consent involved against its will), is absolutely void. The prancing spirits of our Dean of the Faculty (Commissioner Irvine) apparently have been subjected to the same moral and mental concussion, although with customary philosophy and adaptability he has speedily adjusted himself to the new sensations. And while Commissioner Emmet seems to have escaped the full measure of the upheaval involved under the pathological definition of "shock" — that strictly erethismic jolt in which the subject suffers from both excessive emotional and functional disturbance

—manifest symptoms of nerve perturbation appear in his discussion of the circumstances under which alone, as he concludes, may the Commission properly approve increased rates where rate agreements between the parties (railroad and municipality) were supposed, when made, to be absolutely binding.

It seems to be generally understood that under the decision of the Appellate Division in the New York & North Shore Traction Company Case, 175 App. Div. 869, when consent of the municipal authorities to the establishment of a railroad is conditioned upon a maximum fare being observed by the carrier the condition is unconstitutional and hence absolutely void. Now, to hold that a corporation is not irrevocably bound by its unconditional promise made in consideration of a valuable grant to it, is to my mind neither proper, politic nor moral: but in these cases it is manifestly *the law*—with which propriety, public policy and even morality are not invariably or necessarily synonymous, the academic observations of many eminent moralists to the contrary notwithstanding. But at least let us not exact sacrifice of our conceptions of abstract right and wrong to any greater extent than absolutely demanded by the occasional failure of municipal law to precisely align itself with moral law. And I for one prefer to follow the intimation—if not actually the determination of the Court of Appeals that such conditions are legal, and are binding unless and until modified or abrogated by consent of the parties or by a higher power—if only because that conclusion is more consistent with ideas of commonplace corporate morality than the one first above suggested. In *P. S. Com. v. Westchester St. R. R. Co.* 206 N. Y. 209, the court says: “The decision in this proceeding affirms the obligation of the appellant to carry passengers on a continuous passage between the village of White Plains and the steamboat landing, so called, in the village of Mamaroneck for a single fare of five cents. * * * When the village granted appellant’s predecessor an extension of its franchise it had the right as a consideration therefor to exact suitable conditions and agreements from the company in the interest of its inhabitants. There is no doubt that the rate of fare to be charged to and from

[Vol. 14]

Public Service Commission, Second District

points in the village was a matter of such municipal and public interest that the municipal authorities might bargain with reference thereto. Therefore the grant of the new franchise on the condition and consideration, amongst others, of a five-cent fare between the points now involved and the acceptance by the company thereof and its agreement to observe all the 'conditions, regulations and restrictions' thereof, made a valid contract."

It is argued with some plausibility that this was not a rate case and that the determination of the court was addressed merely to the question of a remedy and accordingly is not to be regarded as conflicting with the doctrine apparently enunciated in the North Shore case, *supra*. I am not able to accept this suggestion. The pronouncement of Judge Hiscock in the Westchester case, in which all of his associates concurred, is expressly and unqualifiedly to the effect that a rate of fare condition in a municipal consent to the establishment of a street railroad constitutes *a valid contract*; and while some poet of excessive imagination has suggested that language was given man to enable him to conceal his thoughts, I can not believe that this express and positive formulation by the Court of Appeals was intended by it to be taken otherwise than in its precise verbal significance. And while it is true that the question before the court was substantially one of remedy, the vital fact remains that the court of last resort deliberately gave consideration to the question as to how the conditions of the five-cent franchise involved in the case should be enforced — whereas if it had found that such conditions were void *ab initio*, there would have remained no question as to the method of enforcement. Of course it is to be freely admitted that the Westchester case did not determine, and was not intended to imply, that rate conditions imposed by a municipality under the circumstances mentioned not only are valid but are perpetual unless and until modified or abrogated by mutual consent. But I think it did imply that until modified or abrogated either by mutual consent or by the exercise of the legislative function such conditions must be considered as in the nature of a valid contract and legally controlling. To the same effect is the case of Willcox

v. Richmond Light & Railroad Co., 142 App. Div. 44, affirmed without opinion by the Court of Appeals. Interpreted in this way these and all similar decisions may be brought into harmony with the result, if not actually with the precise reasoning in the North Shore case. And I believe that upon reflection this conclusion is bound to receive the larger measure of commendation. Because if these contract and franchise restrictions as to rates are considered void as being against public policy because of the inherent possibility that some day they may incidentally result either in bankruptcy of the enterprise or serious impairment of the service, to the resultant loss or disadvantage of the public, why should not the same reasoning apply to service contracts between lighting companies and municipalities—or, for that matter, between such corporations and their large consumers—or such corporations *inter se*? If a municipality formally executes a contract with a lighting company whereby the latter agrees to furnish and the former to pay for so many street lamps, during so many hours per night, for a period of so many years, at so much per lamp, is the contract actually void for the reason stated in the North Shore case—to be so declared either at the instance of the city when the municipal treasury may have been abnormally depleted by extravagant expenditures in entertaining the New York State Conference of mayors, or at that of the lighting company when it appears no longer practicable to wring from its long suffering patrons an extravagant return upon its hypothetical capital? And what would become of the many controversies before this Commission which have been disposed of upon the precise basis of just such an agreement as to rates between public service corporation and complaining municipality? Can it be that a regulatory body acquits itself of its duty to compel observance of the law by corporations subject to its jurisdiction through deliberate approval, under a formal order, of the making of an absolutely illegal contract forbidden by the Constitution of the State?

Perhaps it may not be out of place to note that even in the case of a franchise stipulation limiting rates between a corporation

and the supreme law making power itself, there has not been wanting eminent disapproval of an abrogation of the rate condition when not effected by mutual consent. That man of rugged common sense, who some thirty-five years ago stopped over at the Executive Mansion on his way to the White House, vetoed a bill of the New York State Legislature which designed to regulate fares on elevated railroads in New York city in disregard of the provisions of previous statutes, on the ground that the corporation was entitled to the protection of the Constitution of the United States, which prohibits the passage of a law by any State impairing the obligation of contracts. Public Papers of Grover Cleveland, 1883, p. 40. "Veto of Assembly Bill 58, to regulate fares on elevated railroads in New York city."

But that was an exceptional case, and I think we must all accept not only the existence but as well the wisdom and *ultima ratio* of the general principle that in respect of rates charged by corporations which serve the public under either a general or special charter, there is always a reserve power in the Legislature to authorize the exaction of a "living fare" without regard to either the original imposition upon or the voluntary acceptance by the corporation of a lesser maximum fare, which time may prove will not permit it to serve the public other than at a continuing loss. And accordingly I rest my concurrence in the present determination by the Commission upon the proposition that these particular franchise restrictions, contracts or agreements as to rates to be charged by street railroad corporations are neither void *ab initio* nor of perpetual force, but are to be considered as voidable either by mutual agreement between the parties, or by act of the Legislature, or by the Public Service Commission proceeding with due regard to the prescribed circumstances under which its authority to thus regulate has been conferred.

EMMET, Commissioner (concurring).— I am well satisfied with Mr. Carr's and Judge Barhite's reasoning—and indeed with that of all my colleagues—upon the question of the Legislature's

right to approve of increases in fares upon street railroads which are operating in New York state under franchises fixing five cents as the maximum rate to be charged, and of its right, also, to delegate this authority to bodies like the present Public Service Commissions which were created for the purpose of passing upon rate questions in a supposedly expert manner. When it enacted the Public Service Commissions Law the Legislature's intention, I think, was to delegate all its inherent powers in respect to rate regulation to these newly created regulatory agencies of the State. That was the chief reason, as I have always understood, for the creation of the Public Service Commissions. My views on this point were expressed at some length in an opinion which I wrote in connection with an application made two years ago by the Ulster and Delaware Railroad Company for leave to increase its mileage rates, and it is unnecessary that I should repeat them here.

If the disposition we are making of this case shall be held upon appeal to be a lawful one, it will follow, I suppose — and with efficient state regulation of rates it certainly ought follow — that conditions of the kind we are here considering, fixing the fares which shall be charged, will no longer be written into street railroad franchises. Only on the theory, which we now hold to be a mistaken one, that these conditions remain absolutely binding upon both parties unless abrogated or modified by mutual agreement, have they been placed there in the past. But there are other conditions besides those relating to fares which though logically in the same category as fare conditions so far as the power of this Commission over them is concerned, will doubtless continue to be subjects of negotiation, back and forth, between franchise seekers and the public authorities. It is to be hoped that our decision in this matter will not be taken as an indication that, in respect to matters which may properly be bargained about in connection with the granting of a franchise, the Commission has in anywise lost faith in the time-honored rule that a bargain is a bargain, even when one of the contracting parties happens to be a public utilities company. It would be unfortunate if promoters

of new enterprises should feel that hereafter when seeking franchises they may safely agree to almost anything that is asked of them by local boards, without any real intention on their part of carrying out these agreements if they can induce this Commission to relieve them of their obligations upon the mere showing that their profits have not been quite as large as they really ought to have been.

However complete the Commission's jurisdiction may be, it seems to me that in cases where we are asked to set aside franchise conditions that have previously been accepted by the applicant, our first duty is to the public, and it would in my opinion be a violation of this duty for the Commission to use its powers primarily or exclusively for the relief of private investors who voluntarily accepted stiff conditions in order that they might go into a business from which they expected to derive large profits, and who have since suffered some disappointment in their original expectations. In cases which involve the nullification of rate agreements that were supposed, when they were made, to be absolutely binding on both parties, I think it must appear that substantial benefits will result to the public from the granting of the relief that is sought — or, rather, that substantial injury will be suffered by the public if relief is withheld — before we can act favorably on these applications against the protest of one of the parties to the bargain.

In the present case I think that the public interest will suffer if the applicant is not allowed to charge slightly more than it is now charging for the service it renders. The Huntington Railroad Company is not even earning operating expenses, let alone a fair return to its stockholders. Ordinary business prudence would suggest that if this condition is to be allowed to drag on for any length of time the property might better, from the standpoint of its owners, be abandoned entirely, or the service at least be drastically cut down until the bad times have ended. It would certainly not be in the interest of the public that either of these things should happen. I have no doubt that in the case of the Huntington Railroad one or the other of them *will* happen unless

the very moderate measure of relief here asked for is allowed. Nor in such a case as this can relief be long withheld. If it could be, I might favor some other method of dealing with the situation than the one to which we are now giving our approval. There is much to be said, for instance, in favor of the idea that instead of being permitted to raise their fares, street railroads should be exempted from certain forms of taxation to which they are now subject, and which have so multiplied in recent years as to constitute today a very serious barrier to profitable operation and therefore to the maintenance of the kind of service that the public is entitled to receive. But of course it would be entirely beyond the power of this Commission to grant relief along such lines. If the system of taxing public utility companies is to be changed, it must be done by the Legislature, and under the most favorable circumstances it would take a long time to carry any important changes through. In the meantime, under the abnormal conditions of today, many a small street railroad system in New York state is facing ruin, and if ruin overtakes these companies the public will suffer quite as much in bad service as the owners of the enterprise will in loss of money. In other words, I believe it to be as much in the public interest as in that of the owners of the property, that an application like this should be granted — if we have the power to grant it, as I think we have. For that reason, and only for that reason, I am voting for the order in this case.

IRVINE, Commissioner (concurring).— I concur in the conclusions stated by Commissioner Carr as to legal questions involved in this case, and, in the light of recent decisions, I concur substantially in the reasoning whereby he reaches those conclusions. I also concur in his findings and conclusions relating to the facts of the case. I desire, however, to express briefly my individual views upon the two large legal questions involved.

Prior to the decision of *People ex rel. U. & D. R. R. Co. v. Public Service Commission*, 171 App. Div. 607; *affd.*, 218 N. Y. 643, I was of the opinion that the Legislature had not delegated to the Commission the power to permit rates to be increased to

an amount in excess of a maximum rate fixed by statute, except in cases where the statutory rate was confiscatory and the statute, therefore, void and of no compelling force upon any body or individual. While it is true that the opinion of Justice Cochrane in the Appellate Division in the case just cited, upon which the affirmance by the Court of Appeals was based, carefully restricts the effect of the decision to the statute then under consideration, the reasoning of the opinion applies with equal force to section 181 of the Railroad Law — indeed, I believe it applies with greater force. The rate-fixing statute there under consideration (Railroad Law, § 60) contained no qualifying words indicating a controlling power by the Commission. Section 181 here under consideration provides “The legislature expressly reserves the right to regulate and reduce the rate of fare on any railroad constructed and operated wholly or in part under such chapter or under the provisions of this article; and the Public Service Commission shall possess the same power, to be exercised as prescribed in the Public Service Commissions Law.” In answer to the argument that the use of the word “reduce” implies an interdiction of the right to increase, it is sufficient to say that if reductions alone were in contemplation, the word “regulate” would be unnecessary. Its use instead of the use of the word “increase” may have been one of those euphemisms which, unfortunately, sometimes creep into legislation for a more or less obvious purpose. This power to regulate and reduce is to be exercised as prescribed in the Public Service Commissions Law, and the Public Service Commissions Law has, for some years, contained an express provision for permitting an increase of rates under certain circumstances. This is the later expression of the legislative will.

In the Ulster and Delaware case, the Commission and the Court were dealing with the price of mileage books — a single and a subordinate source of the revenue of a steam railroad. In this case we are dealing with fares on street railroads — the only substantial source of income. A rate fixed so low as not to yield a fair return upon the value of the property invested is confisca-

tory. *Smyth v. Ames*, 169 U. S. 466, and many other cases. In *Smyth v. Ames*, the decree affirmed provided that the appellants might, "when the circumstances have changed so that the rates fixed in the said act of 1893 shall yield to the said companies reasonable compensation for the purposes aforesaid, apply to the court for a further order in that behalf." In other words, the court there recognized that such a statute might be confiscatory and void under certain conditions of business, but that the rates fixed thereby might become compensatory and the statute valid from changed conditions. The reverse must be true; that such a statute may be valid when enacted and under conditions then existing, but may become non-compensatory and therefore void under changed conditions. Ordinarily, in such cases, appeal has been made to the Legislature or to the courts for relief, but the power of the Legislature in that respect has been delegated to this Commission and should be exercised in a proper case.

Upon the other question, that is to say, the power of the Commission to interfere under any circumstances with a rate of fare imposed by a municipality as a condition for granting a franchise, or by formal contract between the municipality and a street railroad corporation, my personal views were expressed in an Opinion of the Commission in *Matter of the Application of the New York & North Shore Traction Company*, 4 P. S. C. 2d Dist. 587. I then thought that the constitutional inhibition against the construction of a street railroad, without a consent of the municipality, conferred upon the municipality power to exact, as a condition to granting that consent, a stipulation as to the fares to be charged. My opinion in that respect suffered a shock by the decision of the Appellate Division in the same case, annulling the order of the Commission. *People ex rel. New York & North Shore Traction Company v. Public Service Commission*, 175 App. Div. 869. This case is directly in point, and is the decision of the court that has the direct power of review, so far as review is permitted, of the orders of this Commission. I believe the Commission is bound by its authority until it is reversed by the Court of Appeals, or unless the Court of Appeals

[Vol. 14]

Public Service Commission, Second District

has manifestly and beyond question decided to the contrary. I have little to add to Commissioner Carr's discussion of the cases in the Court of Appeals, relied upon by those who have argued the question before the Commission as having the effect of laying down a rule contrary to that in the New York and North Shore case. The principal case of this character is Public Service Commission v. Westchester Street R. R. Co., 206 N. Y. 209. There is language in the opinion in that case inconsistent with certain language in the opinion of the New York and North Shore case, but the conclusions reached are not inconsistent. I am led to the belief that the present law of the State is that, while a municipal corporation may bargain as to fares in negotiating or granting its consent to construction and operation, the result of such a bargain is merely a contract between the parties thereto, subject to be modified or annulled by the State in the exercise of its police power. The police power in that respect has been delegated to the Commission. The Westchester case was not a rate case; the Commission had not exercised its power to interfere with the contract, but on the contrary was in court seeking the enforcement of the contract. The language referred to in the opinion as establishing the binding force of such a contract was used in connection with this state of facts, and it can not be inferred from the decision in the case, or from any language in the opinion, that the constitutional provision requiring municipal consent operates to transfer to the municipality the exercise of the sovereign power, or that it divests the Legislature of the exercise of such power. If the Legislature possesses the power, it has delegated it to the Commission, and the Commission should exercise it in the way either of increases or reductions in rates when the public interest so requires.

BARHITE, Commissioner (concurring).— There seems to be a widely spread misapprehension as to the powers of the Public Service Commission in this case and in the various other applications by the street railway companies of the State for permission to increase their rates of fare. The common thought is apparently

that the fate of the demanded increase depends entirely upon the discretion of the Commission—that the action of that body must rest upon its good sense and nothing more. No conception of the duty of the Commission can be more erroneous. The statutes of the State and the decisions of the courts prescribe the conditions which must exist to entitle a railway company to an increase in its rate of fare. If the prescribed conditions are present, the company has the absolute right to an increase. If they are not present, it has no such right. Within the lines made by the statutes and the courts the Commission must do its work, and its function is to determine, not whether as a matter of justice the company ought to receive a larger income, but whether under the law and the facts as presented the company, as a matter of legal right, must receive permission to charge an increased rate of fare. Its limitations are those of a judge who determines not according to his own personal sense of right and wrong but under the rules laid down by a superior authority.

Commissioner Carr in a very able and comprehensive opinion has discussed two legal questions which are of supreme importance in the decision of this case, and in view of their importance it may not be out of place to approach them from a slightly different angle although the ultimate conclusion may be the same.

The first of these questions is whether a public service corporation like a street railroad has the capacity to accept a franchise or make a contract limiting itself to a rate of fare which subsequent events show is not sufficient to enable it to perform its whole duty to the public.

This question goes not so much to the character of the contract as to the legal right of the corporate body to make it, although in determining the corporate power the character of the contract must be considered.

It may be said in the first place that any individual or corporation may waive any rule of law, statutory or constitutional right or privilege, provided public interests are not involved. *Phyfe v. Eimer*, 45 N. Y. 102, 104; *Sentenis v. Ladew*, 140 id. 463, 466. Is not the public interested in the rate of fare which a rail-

[Vol. 14]

Public Service Commission, Second District

way corporation may impose, not only that such rate shall not be excessive, but that it shall be sufficient to enable the company to render proper and adequate service? The first duty of a public service corporation is to the public — a duty which can be enforced — and argument is not needed to the effect that such duty can not be performed without a sufficient return to enable the company to not only pay running expenses but to make needed improvements and extensions and a profit which will induce persons to invest their money in the securities of such corporation. The true principle of law would seem to be that a public service corporation can not accept nor can a municipality impose a condition that in the future will prevent the corporation from meeting changed conditions and advanced expenses, over which it has no control, and still perform its full measure of duty to the public.

In *Chicago Union Traction Co. v. City of Chicago*, 199 Ill. 484, 542, the court uses this language: "The general rule is that a railroad company is a *quasi* public corporation and under peculiar obligation to the public, and that, consequently, it can not make any contract, which will disable it from performing its public functions."

In *Ben Avon Borough v. Ohio Valley Water Company*, P. U. R. 1917 C, 390, the water company had made a contract to furnish water at a certain rate to the borough of McKees Rocks. This contract antedated the Public Service Commissions Law. Afterward, the company sought to increase the rate named in the contract. The Public Service Commission discussed at great length its power to determine the reasonableness of the rates named in the contract, citing many authorities. In the course of its opinion the Commission says, at page 412: "The court and Commissions in the following cases have been equally clear in upholding the principle that a rate contract for either a definite or indefinite period is not impaired by the exercise of the regulatory authority on rates by the State either directly or through a Commission appointed for that purpose."

And again, at page 413: "We are therefore of opinion that the contract between the borough of McKees Rocks and the Ohio

Valley Water Company as well as all other contracts in which are prescribed rates for service, furnished by the respondent to any municipality, whether such contracts be for a definite or indefinite period, in so far as they attempt to fix rates, do not prevent this Commission from determining whether or not they are just, reasonable, or adequate."

A contract might be made between a municipality and a corporation at the outset of its career which would be just, and a rate of fare might be prescribed which would amply compensate the company for its service, and yet future conditions unforeseen at the time of the execution of the contract might render such rates absolutely inadequate; and because the officers of the company were not gifted with prophetic vision, should this company be compelled to struggle on insufficiently clothed and fed until worn out by lack of nourishment it drops into a pauper's grave?

Another question is this, has the State through the Legislature the power to control and limit the rates which may be charged by a street railroad company? It must be conceded that the State has such power if the prescribed rates are not confiscatory. And the term confiscatory as used in this connection has a meaning somewhat modified from the interpretation usually given to it in ordinary speech. As used by the courts it does not mean an actual seizure or deliberate appropriation, but rather a steady choking process by which the sustenance of a corporation is reduced to a degree that will eventually compel the corporation to suspend its public functions.

The rates prescribed must be fair and reasonable and give a just and proper return upon the property invested. *Smyth v. Ames*, 169 U. S. 466.

In the case cited, the court says, page 521: "It can not be doubted that the making of rates for transportation by railroad corporations along public highways between points wholly within the limits of the State, is a subject primarily within the control of that State."

But the Supreme Court of the United States, in the same case, quoted with approval from the opinion of Chicago, Milwaukee &

[Vol. 14]

Public Service Commission, Second District

St. Paul Railway v. Minnesota, 134 U. S. 418, as follows: "If the company is deprived of the power of charging reasonable rates for the use of its property and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States, and in so far as it is thus deprived while other persons are permitted to receive reasonable profits upon their invested capital the company is deprived of the equal protection of the laws."

In *Stone v. Farmers Loan & Trust Company*, 116 U. S. 307, the court holds that a state government has the power to limit the amount charged for railroad transportation within the State; and again, in speaking of the power of the State to regulate and determine the rates to be charged, says: "From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit; this power to regulate is not a power to destroy and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freight the State can not require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law."

In the *Minnesota Rate Cases*, 230 U. S. 352, at page 433, Mr. Justice Hughes, who speaks for the court, laid down this principle: "The property of the railroad corporation has been devoted to a public use. There is always the obligation springing from the nature of the business in which it is engaged — which private exigency may not be permitted to ignore — that there shall not be an exorbitant charge for the service rendered. But the State has not seen fit to undertake the service itself; and the private property embarked in it is not placed at the mercy of legislative caprice. It rests secure under the constitutional protection which extends not merely to the title *but to the right to receive just compensation for the service given to the public.*"

In view of the very plain words of the highest judicial authority

in this country, there can be no confusion as to the boundary lines beyond which the State can not go in its regulation of railroad rates.

Has this Commission the power to investigate and determine whether a five cent fare is inadequate, and if so to afford proper relief? The Public Service Commission is a statutory body and has only the power delegated to it by the Legislature. Section 181 of the Railroad Law limits the rate of fare upon a street surface railroad to five cents, except in certain specified cases, and reserves to the Legislature the right to regulate and reduce the rate and gives to the Public Service Commission the same power. Section 49 of the Public Service Commissions Law, which must be construed in harmony if possible with section 181 of the Railroad Law, is as follows:

“Whenever either Commission shall be of opinion * * * that the rates, fares or charges demanded, exacted, charged or collected * * * are unjust, unreasonable * * * or that the maximum rates, fares or charges, chargeable by any such common carrier * * * are insufficient to yield reasonable compensation for the service rendered * * * the Commission shall with due regard * * * to a reasonable average return upon the value of the property actually used in the public service * * * determine the just and reasonable rates to be thereafter * * * in force as the maximum to be charged * * * notwithstanding that a higher rate * * * has been heretofore authorized by statute, and shall fix the same by order to be served upon all common carriers * * * by whom such rates are thereafter to be observed.”

The foregoing skeleton of section 49 of the Public Service Commissions Law contains all the words necessary for its interpretation and simplifies a determination as to its meaning. By this statute the Legislature has named two situations, in either of which the Commission is authorized to act: *First*, When the rates *actually* charged are improper or unjust in amount; *Second*, When the highest rates *chargeable*, that is to say when the highest rate which the company is authorized to charge by any statute or other

[Vol. 14]

Public Service Commission, Second District

controlling authority, is insufficient to yield a reasonable compensation. In one case the Commission acts for the protection of the public; in the other, it acts for the protection of the company and the public. In either case the Commission is directed to embody its conclusions in an order, and the carrier is directed to observe the rate prescribed by that order.

The Legislature says to the Commission: "If you find that the company is charging an exorbitant rate or if you find that the highest rate which the company is authorized to charge by statute or by other competent authority is insufficient for the company's purposes, in either case you fix the rate by order and the company must respect your determination."

Were it not for the words "notwithstanding that a higher rate, fare or charge has been heretofore authorized by statute," not a foothold could be found upon which to stand and make the argument that the Commission can not by order fix a rate beyond the statutory limit.

To allow the words quoted to control and modify the whole statute makes an unreasonable construction.

In *People ex rel. Hollocke v. Hennessy*, 205 N. Y. 301, it is held that if the meaning of a statute is doubtful, such a construction should be given as will not lead to unreasonable results.

In *Matter of Meyer*, 209 N. Y. 386, it is held: "Where particular application of a statute in accordance with its apparent intention will occasion great inconvenience or produce inequality or injustice another and more reasonable interpretation is to be sought * * * the courts must in that event look to the act as a whole, to the subject with which it deals, to the reason and spirit of the enactment, and thereby determine the true legislative intention and purpose."

In *Smith v. People*, 47 N. Y. 330, it is held that a statute should not be so construed as to work a public mischief unless required by words of the most explicit and unequivocal import. Words absolute in themselves and language the most broad and comprehensive may be qualified and restricted by reference to other parts of the same statute.

If it is found that the maximum rate which the company is authorized to charge is insufficient to yield a reasonable compensation, then without question the Commission is directed to determine what would be a reasonable compensation and to embody that determination in an order, and the corporation is commanded to observe the rate named in the order. If it is found from the facts in any case that the maximum statutory rate will not yield a reasonable compensation, and the law is interpreted to mean that the Commission can not go beyond the statutory rate, then the only conclusion must be that the Legislature has directed the Commission to make an order which does not embody its true determination, or that the corporation is directed to obey an order which the Commission has no power to make.

Would not such an interpretation be unreasonable and lead to great public mischief?

The conclusions of the Commission it seems to me are in the interests of the public, which is greatly concerned in the continuance and the prosperity of its means of transportation. The true measure of compensation which must be given is clearly and succinctly stated by Mr. Justice Harlan, late of the Supreme Court of the United States, who, after calling attention to the fact that a railroad is a public highway, says: "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

[Vol. 14]

Public Service Commission, Second District

Petition of ITHACA TRACTION CORPORATION under Subdivision 1,
Section 49, Public Service Commissions Law, for Permission
to Increase Passenger Fares

Case No. 6087

(Public Service Commission, Second District, November 21, 1917)

Application of a traction corporation for leave to increase its passenger fares.

The Ithaca Traction Corporation was reorganized in 1914 and at that time the Commission found the value of the property to be \$734,000. Additions made since then represent an added \$335,331.92. The value of the entire property at the close of December, 1916, was \$1,169,536.92. Based upon these figures and on the aggregate cost of operation and maintenance the Commission held that the increase asked for by the company would interfere with the benefit which may be expected to result from a moderate increase in its fare at the present time. In this case a straight increase is allowed from five to six cents as the fare to be charged by this corporation for a single ride within the city of Ithaca.

Charles E. Hotchkiss and H. C. MacCollom, attorneys for applicant.

H. A. Clarke, as secretary and general manager of applicant.

Bert T. Baker, city attorney, for City of Ithaca.

H. Bergholtz, as engineer, for City of Ithaca.

EMMET, Commissioner.— This application has been made by the Ithaca Traction Corporation under subdivision 1, section 49, of the Public Service Commissions Law, for permission to increase its fares for a single passenger within the limits of the city of Ithaca to seven cents, or to sell four tickets for twenty-five cents. each ticket being good for a single fare within the same limits. The franchises of this company contain no restrictions as to rates of fare.

The Ithaca Traction Corporation was reorganized in 1914, and in connection with this reorganization the reproduction value of the property used by the company in the public service, including intangibles, was ascertained by this Commission to be \$734,000. Since the taking over of the property by its present owners, additions to capital, including intangibles, have been made, which on December 31, 1916, amounted in value to \$335,331.92. The value of all the property in use in the public service, including intangibles, on December 31, 1916, appears to have been \$1,169,536.92.

For the purposes of this proceeding an apportionment has been made, as the result of which it appears that the value of that portion of the applicant's property which is actually employed in the public service within the proposed increased fare zone, including intangibles, is \$758,690.75. Without taking intangibles into account, the value of property used in connection with operations within the increased fare zone would be \$584,991.42. The income available for a return on the value of property thus used within the increased fare zone has been allocated, and appears to have amounted during the year 1916 to \$31,298.55. This represents a return of 4.12 per cent on the value of the property actually used, including intangibles, and 5.36 per cent on the value of the property with the intangibles omitted.

Careful estimates have been made of the effect which the charging of a seven-cent fare, or the selling of four tickets for twenty-five cents, would have upon the earnings of the company, based on the earnings and expenses of the year 1916, and upon an appropriate allowance being made for increase in expenses. These estimates show that the probable annual earnings available for a return on the value of the property used in the increased fare zone would, under the new rates, amount to \$50,941, or to a 6.72 per cent return if intangibles are included in the computation, and an 8.72 per cent return if intangibles are not included. It appears, however, that taking the entire business of the company into account, outside as well as inside the increased fare zone, the total net earnings with the new rates in force would represent a yield

of but 5.46 per cent with intangibles included in the computation and 6.76 per cent with these omitted. This estimate makes no allowance for the increased amount necessary to be set aside to cover annual maintenance and depreciation.

The testimony introduced on behalf of the Ithaca Traction Corporation as to the value of its property and the amount of income which is now available as a return upon property in the increased fare zone has been characterized by representatives of the city of Ithaca who have attended at the hearings as misleading and incorrect. The company's operation has also been attacked as extravagant. We have given very careful consideration indeed to all these criticisms, but have been able to find no serious fault with the company's methods of apportioning its property according to the zones in which it is employed nor with its allocation of income as between these zones. In the attack which the representatives of the city have made upon the alleged extravagance of the company's operation, considerable stress has been laid upon the number and amounts of the salaries paid, the claim being that the company's salary list is unwarrantably burdensome and that a reasonable allowance for this purpose might materially affect the Commission's opinion upon the question before it in the present case. We do not agree with this view. The salaries paid are not in our opinion too high. Even if they were, the amount involved would be very much too small to affect in the slightest degree the question whether this company should now be permitted to charge a higher rate of fare in the city of Ithaca. Under its present management the property appears to us to be efficiently managed. It seems unnecessary that we should go very closely into the question of the intangibles which have been included in the company's statement of assets, because for the purposes of the present case these may be entirely omitted from the calculations and still the return from the rates permitted by this order could not, we think, under present conditions possibly be so large as to justify the Commission in characterizing it as excessive. It is true that the figures before us show an estimated yield of 8.72 per cent from a seven-cent rate upon the property of the company.

that is properly apportionable to the increased fare zone, but this is based on last year's prices for coal and other material. With materials of all kinds costing what they do to-day, it seems unlikely that even with increased fares there will be any considerable return, available for stockholders, upon the value of the property that is employed within the increased fare zone. This statement may be made with even greater certainty in connection with the company's business as a whole. It appears that with seven-cent fares in force on part of the system, omitting intangibles from the calculation entirely, and estimating the cost of operation upon last year's prices for labor and material, only a 6.76 per cent yield is expected on the value of the entire property of the company employed in the public service. The abnormal increases in operating expenses since last year would certainly reduce this 6.76 per cent yield to one that would be merely nominal, and very possibly to an actual deficit.

While under the circumstances the Commission has no doubt whatever that the Ithaca Traction Corporation should be permitted to charge a higher fare than five cents within the limits of the city of Ithaca, it has upon reflection concluded that the suggested increase from five to seven cents for a single fare would neither be in the interest of the applicant company nor of the patrons of the road. The increase in fare which should be approved in this case ought, we think, be the same as that which we are approving in other cases similar to this, an increase from five to six cents. The Commission is of the opinion, from the investigation it has made of the subject in this and other cases, that a more drastic change than this at the present time might so discourage travel upon the company's lines within the limits of the city of Ithaca as effectually to defeat applicant's purpose in coming to the Commission for leave to increase its fares. It is true that the plan of selling four tickets for twenty-five cents virtually amounts to the charging of a six-cent fare to those who purchase these tickets, but it is believed that notwithstanding this feature of the company's proposal the necessity for paying seven cents for a single fare by all who do not make it a practice to buy

[Vol. 14]

Public Service Commission, Second District

tickets in quantities, would lead to the loss of enough of the company's regular business materially to interfere with the benefit which may be expected to result from a moderate increase in its fare at the present time.

The Commission is therefore approving in this case, as in others, of a straight increase from five to six cents as the fare to be charged by the Ithaca Traction Corporation for a single ride within the city of Ithaca. We entertain no doubt whatever as to our right to make such an order, nor as to our duty to make it under such circumstances as have been presented for our consideration in connection with this application.

All concur.

In the Matter of the Petition of the ALBANY SOUTHERN RAILROAD COMPANY Under Section 68 of the Public Service Commissions Law for Permission to Construct in the Town of Greenport, Columbia County, an Electric Plant, and for Approval of a Franchise Therefor Received from said Town

Case No. 6233

(Public Service Commission, Second District, December 6, 1917)

Application of an electric railroad company for the construction of an electric plant in a town along its right of way and for approval of local franchise therefor.

The Albany Southern Railroad Company brought this proceeding to secure permission to construct in the town of Greenport, Columbia county, N. Y., an electric plant in accordance with a local franchise therefor granted by the authorities of the said town. For several years last past the petitioner and its predecessors have been engaged in selling and distributing electric energy for light, heat and power purposes in the northerly portion of the town of Greenport. The Red Hook Light, Heat and Power Company opposes the present application. The latter company had itself sought permission from the Commission to exercise such a franchise in the same town but the Commission had denied its application, with the condition that if the Red Hook Company should file with the Commission within six months from the date of the order a stipulation consenting to limit the exercise of its proposed franchise to the territory south of the city line of Hudson and the Columbia turnpike

the Commission would permit the company to exercise such franchise. No such stipulation, however, has ever been filed by the company. The Red Hook Company has apparently elected not to exercise its franchise in the town of Greenport. None of its lines are within three miles of the southerly boundary of the town of Greenport at the present time. The Red Hook Company does not propose to extend its lines into that territory and if it did could not handle the business as conveniently as the petitioner herein. Petition granted with the usual restrictions.

Petition filed October 18, 1917.

Affidavits of publication filed October 25, 1917.

Hearings held at the office of the Commission in the city of Albany on November 5 and 19, 1917.

Randall J. LeBoeuf, for petitioner.

James F. Riley, for Red Hook Light, Heat and Power Company in opposition.

BY THE COMMISSION.— This is an application by the Albany Southern Railroad Company for permission to exercise a franchise granted by the municipal authorities of the town of Greenport, Columbia county, N. Y., on October 4, 1917. The petitioner and its predecessors have for several years last past been engaged in selling and distributing electric energy for light, heat and power purposes in the northerly portion of the town of Greenport. In Case No. 2872 the Red Hook Light, Heat and Power Company was before the Commission on an application for permission to exercise a franchise granted to it by the town of Greenport and the petitioner here was also before the Commission in Case No. 2855 seeking permission to exercise a franchise in the same town.

The Commission handed down orders in each of these two cases on June 23, 1914, the one in Case No. 2855 permitting the Albany Southern Railroad to exercise a franchise granted by the town board of the town of Greenport on April 3, 1912, in the territory north of the so-called Columbia turnpike, and the other, in Case No. 2872, denied the application of the Red Hook Company for permission to exercise a franchise in the town of Greenport as

[Vol. 14]

Public Service Commission, Second District

requested in the application but there was a provision in that order to the effect that if the Red Hook Company should file with the Commission within six months from the date of the order a stipulation consenting to limit the exercise of the franchise to the territory south of the city line of Hudson and the Columbia turnpike, an order would be made by the Commission permitting the Red Hook Company to exercise its franchise therein. The Red Hook Company has never filed with the Commission such a stipulation and the secretary of the Commission so testified at the hearing held on November 19, 1917, so that it now appears that the Red Hook Company has never extended its lines in the town of Greenport under the provisions of the franchise granted by the municipal authorities of that town. That franchise contains a condition requiring the company to supply electricity to the residents on the "Blue Store road" as far as the city line of Hudson within two years after the approval of the franchise by the Public Service Commission, and that the franchise is to be void if electricity is not supplied in accordance with its terms. It is apparent that the Red Hook Company has elected not to exercise the franchise in the town of Greenport because of its failure to make the stipulation as required in the order of the Commission. At the present time its lines extend north from its power plant in the town of Clermont to the hamlet of North Germantown in the town of Germantown. None of its lines are within three miles of the southern boundary of the town of Greenport at the present time. The general manager of the petitioner testified that there is at present a demand for at least 200 kilowatts of electric energy in that portion of the town of Greenport south of the city of Hudson and that the petitioner is prepared to extend its lines and take care of this business at once. It is very apparent that the Red Hook Company does not propose to extend its lines into that territory and it is apparent that it cannot handle the business as conveniently as the petitioner herein. While the Commission attempted in Case No. 2872 to apportion the town of Greenport between the two companies so as to avoid the duplication of lines and the waste incident thereto, yet only one of the companies

accepted the determination of the Commission in that case, viz: the petitioner herein. Under the circumstances the Commission is of the opinion that public convenience and necessity require the exercise of the franchise granted to the Albany Southern Railroad Company by the town board of the town of Greenport on October 4, 1917, and it is therefore ordered:

1. That pursuant to the provisions of section 68 of the Public Service Commissions Law the permission and approval of this Commission be and they hereby are given to the Albany Southern Railroad Company to construct, maintain and operate an electric plant in the town of Greenport, Columbia county, N. Y., together with all transmission and distribution lines required for use in connection therewith, and to the exercise by it of the franchise granted to it by the town board of the town of Greenport on October 4, 1917, subject to all of the terms and conditions therein set forth.

2. This order is not intended to and shall not be construed to authorize any construction work in or upon any state or county highway unless and until the consent to and approval of such construction work shall have first been duly given by the State Commission of Highways.

Petition of the TOWN BOARD AND SUPERINTENDENT OF HIGHWAYS OF THE TOWN OF PITCAIRN, St. Lawrence county, under Section 90, Railroad Law, for a Determination of How a New Highway Laid Out in Said Town Shall Cross the Carthage and Adirondack Branch of the New York Central Railroad

Case No. 6211

(Public Service Commission, Second District, December 18, 1917)

Application for a determination of how a new highway shall cross a railroad.

The question herein is raised by the petition of the town authorities of Pitcairn, St. Lawrence county, to have the Commission determine in what manner a new highway laid out in that town shall cross the Carthage and Adirondack branch of the New York Central railroad. The new highway in question was laid out by the town and crosses the

single running track and a sidetrack of the Newton Falls branch of the St. Lawrence division of the New York Central railroad at a point about 1,000 feet west of Kalurah station. The railroad runs east and west and the new highway north and south. About 100 feet east of the station is a grade crossing and another about 1,800 feet west thereof. The new crossing proposed would be about midway between the two and would result in three grade crossings within a distance of 1,900 feet. The result would be an extremely dangerous grade crossing owing to obstructions of the view. The principle that considerations serving public convenience only must always yield to those which affect public safety is well established.

While the local authorities have the exclusive right to determine the necessity for and the location of a new highway, it is not so in respect of the manner in which such highway shall cross a railroad, which latter must be determined with due regard to the public policy of the State; and, while the Public Service Commission may permit a new crossing at grade, such permission should be given only in exceptional cases and where the safety of the public would not be materially jeopardized. The Commission therefore determines that the crossing shall be over grade, but, in the expectation that the town will prefer to consider the alternative suggestions of the Commission that a stretch of connecting highway shall be built before embarking upon the expense involved in the timber overhead structure which would be required if the highway as laid out shall be carried over the grade of the railroad, the details as to the height and character of the bridge structure and as to other points are not now specifically determined, but may be decided on motion of either party at the foot of this determination through entry of a supplemental order.

J. C. Bardo for the Town Board and the Town Superintendent of Highways.

A. J. Pearson, Town Superintendent of Pitcairn, in person.

B. B. Voorhees, Engineer of Grade Crossings, for The New York Central Railroad Company.

VAN SANTVOORD, Chairman.—The new highway laid out by the town crosses the single running track and a sidetrack of the Newton Falls branch of the St. Lawrence division of the New York Central railroad at a point approximately 1,000 feet west of Kalurah "station," which is an imposing edifice constructed upon the so-called "open camp" plan—with three sides and a roof. General direction of railroad is east and west, while that of the proposed new highway is north and south.

There is a grade crossing about 100 feet east and one about 1,800 feet west of the "Kalurah." The proposed new crossing would be approximately midway between the two existing crossings, which would result in three grade crossings within a distance of 1,900 feet.

Beginning substantially at the proposed crossing point, in its general easterly course the railroad bends sharply to the north on a curve of about five degrees; while to the west of said crossing point the track is on a tangent alignment.

Each of the existing crossings is on the same town road which makes a long bend; and the railroad cuts this bend in two places. Easterly, this town road runs to Jayville, which name has been bestowed upon the crossing; westerly, the road runs to Pitcairn, and accordingly the westerly crossing has been called the Pitcairn crossing.

The highways in this vicinity are more of the nature of trails than of roads, and highway traffic is exceedingly light. Two vehicles were observed between 10 A. M. and 3 P. M. in the entire neighborhood on October 18, 1917. Lumbering and farming are the only apparent industries, with very little of the latter in evidence, most of the products being for home consumption.

Altogether there are not more than eleven or twelve houses south of the railroad for a distance of perhaps one and one-half miles, at the end of which stretch there is another house occupied by a family named Dunning. The proposed new crossing is mainly for the convenience of these families, who now cross the track by private road through lands of J. Shannon leading to the Jayville crossing. This road is obstructed in winter by logs destined for a sawmill located south of and adjacent to the railroad. There is also a schoolhouse south of the tracks near the sawmill; and trails on private property lead to both sawmill and schoolhouse.

The new highway is laid out on a roadbed of an old abandoned railroad siding leading into the forest south of the track, where it ends at the Dunning house above mentioned about one and one-half miles from the railroad; and north of the tracks it practically coincides with an existing trail, which although used as such, hereto-

[Vol. 14]

Public Service Commission, Second District

fore was not a legal highway. If grade crossing is made, then all travel from south of the railroad bound either to Jayville or Pitcairn must cross the railroad twice at grade; while at the present time the observation applies only in respect of travel to Pitcairn. And it should be observed that views of the railroad at the proposed new crossing are not unobstructed except the view to the west when approaching the track from the south.

The railroad operates two passenger trains and one freight (the latter at night only) each way per day — in all, six train operations not counting possible switch movements.

On account of the difficulty of drainage, it would be impracticable to carry the new highway under the railroad, so that the only feasible methods of crossing are at grade and overgrade of the railroad, and the former method is proposed by the town. To cross by a permanent structure (masonry abutments, steel bridge, etc.) probably would cost about \$30,000. Since timber ought to be comparatively cheap in this country, and a timber bridge could reasonably be expected to have a life of at least fifteen years, on the supposition that such a structure would answer the purpose, an estimate was made for an overgrade crossing sixteen feet wide the approximate cost of which would be the sum of \$8,000. Such an overhead crossing, however, would necessarily be located at the cut a short distance east of the proposed grade crossing and therefore not in the precise line of the new highway as laid out.

It seems that the problem might be solved and the people provided with an outlet either by building a new road about 1,000 feet long parallel with the railroad on the south side thereof from the new highway westerly to the Pitcairn road, or by laying out a new highway along or approximately along Shannon's private road to the Jayville crossing toward the east. The cost of the first mentioned project has been estimated by the engineers at not to exceed \$2,000; while the expenditure involved in the other suggestion — a road through the Shannon property — would be limited to the cost of the land necessarily to be acquired. The statutory share of the town (one-half) in the cost of an overhead

crossing of the proposed new highway by a timber bridge would approximate four thousand dollars.

In applications of this kind the view seems to be prevalent that the main, if not the only, questions for consideration, are those of public convenience and necessity and the preference of the municipality as to the method of crossing. This view is erroneous. The considerations properly involved have been clearly and convincingly stated by the Appellate Division of the Fourth Department, which in affirming an early order of this Commission in a similar case said —

“The formal proceedings had by the town board in laying out the proposed highway crossing the railroad it is conceded were regularly taken. It seems also to be conceded that a crossing at grade is, as the highway has been laid out, the only practicable crossing by which the proposed highway can be made to serve the convenience of the vehicular traffic of the public having occasion to do business at the Sweeney cold storage plant, as it is now located and constructed. That this traffic will be better accommodated by the proposed highway seems to be practically the only reason why it should be built. The argument which appellant urges as being a conclusive reason that the order should be reversed seems to be in substance this. The town board had the exclusive right to determine the necessity for and the location of the new highway. As now laid out it is, as is claimed, a physical impossibility to construct it either above or below the railroad and serve the only purpose which makes its construction necessary. The Public Service Commission is, therefore, bound to allow the highway to cross the railroad at grade, because that is the only feasible crossing by which the only necessity for the highway can be met. If this argument is sound, then no choice is left to the Commission except to ratify a decision of the town board as to the manner in which the highway shall cross the railroad, and application for its decision as to the manner of crossing is an empty form. We are unable to agree with this contention of counsel. The present public policy of the State as indicated in the statute is the ultimate elimination of dangerous grade crossings. People ex rel. City of

[Vol. 14]

Public Service Commission, Second District

Niagara Falls v. New York Central & H. R. R. Co., 158 N. Y. 410; New York Central & H. R. R. Co. v. City of Buffalo, 128 App. Div. 373. This of course includes, at least so far as practicable, the prevention of making new and dangerous grade crossings, which, if permitted, would necessarily result in additional crossings, which must be ultimately abolished before full effect to the public policy expressed in the statute is given. That the Public Service Commission may permit a grade crossing is, of course, apparent. But it would seem that such permission should be given only in exceptional cases and where the safety of the public would not be materially jeopardized. Appellant's position involves the proposition that the Public Service Commission must yield permission for a grade crossing, however dangerous it may be, if such a crossing is necessary to make the use of a new highway practicable, and yet as soon as it has been established the Commission can of its motion at once inaugurate proceedings for its alteration, as provided in section 68 of the Railroad Law (added by Laws of 1897, chap. 754). We can not accept this as a reasonable interpretation of the effect of the statute.

"If the proposed highway should be carried across the railroad at grade, it clearly appears that the result would be an extremely dangerous grade crossing owing to obstructions of the view which travelers approaching it in either direction would have. It would be, as the commissioner before whom the hearing was had not inaptly described it, a 'death-trap.' The principle that considerations serving public convenience only must always yield to those which affect public safety is well established."

So far as I am aware, determination by the Commission of all such applications has invariably rested upon the precise reasoning so admirably expressed by the Supreme Court in the opinion quoted. Under the circumstances of this case and the conditions above recited, this Commission is of opinion that the proposed new highway carried over the railroad at grade would unnecessarily create a dangerous grade crossing not to be justified within the limits indicated by the Supreme Court and in previous determination of this department as properly controlling in such a case.

To be sure, in the present stage of operation train movements at the point in question are not frequent. But it is not alone at crossings where railroad traffic is heavy that accidents happen; some crossings of railroads carrying very light traffic and with good views available have exceptional records of disaster — in forcible illustration of which reference may be had to an accident at Hornellsville on the Pittsburg, Shawmut and Northern Railroad (referred to in one of the reports of the Board of Railroad Commissioners of this State). At the crossing involved in that accident, although the track was straight and the views were long and entirely unobstructed, through carelessness of the driver fourteen out of fifteen women riding in one conveyance were killed.

In proceedings of this kind the Commission is required to determine whether the new highway shall be constructed over or under the railroad or at grade; and if the determination is in favor of an overgrade crossing, then the Commission must determine the height, the length, and the material of the bridge or structure by means of which the highway shall be carried across the railroad, and the length, character, and grades of the approaches thereto. For reasons stated, the Commission now determines that the crossing shall be overgrade; but, in the expectation that the town will prefer to consider the alternative suggestions of the Commission that a stretch of connecting highway shall be built from a point near the railroad either westerly to the Pitcairn road or easterly to the Jayville crossing, before embarking upon the expense involved in the timber overhead structure which would be required if the highway as laid out shall be carried over the grade of the railroad, the said details as to the height and character of the bridge structure, the length of the approaches, etc., are not now specifically determined. These other requirements will be observed through entry of a supplemental order if and when either party shall apply at the foot of this determination for such further order in the premises as will enable completion of the project by the overhead crossing thus finally to be provided for.

Commissioners Irvine and Carr concur; Commissioners Emmet and Barhite not present.

In the Matter of the Joint Petition of the CITY OF MOUNT VERNON, the CITY OF YONKERS, THE NEW YORK CENTRAL RAILROAD COMPANY, and the BRONX PARKWAY COMMISSION for a Modification of Orders of this Commission dated September 12, 1907, and June 22, 1912, the Modification Asked for Being with Respect to the Location and Construction and Design of an Overgrade Crossing of the New York and Harlem Railroad, Lessor, Extending from Broad Street, City of Mount Vernon, to Vermont Avenue, City of Yonkers

Case No. 254

(Public Service Commission, Second District, December 27, 1917)

Modification sought by the communities and corporations interested of orders of the Commission as to the location, construction and design of an overgrade crossing of the New York and Harlem Railroad, lessor, extending from Broad street, city of Mt. Vernon, to Vermont avenue, city of Yonkers.

On the 12th day of September, 1907, and on the 22d day of June, 1912, orders were made by the Commission covering certain details of the overgrade crossing described in the opinion. An amendatory order was made under date of December 16, 1915. Under the proceeding thus instituted in the spring of 1916 a petition was presented to the Commission for its approval, including a proposed contract with one Guy Vroman, civil engineer, for all plans, specifications and estimates, engineering, superintendence, etc., in connection with the said overgrade crossing. The railroad which was doing the work estimated a charge of \$1,537.09 in the aggregate for engineering and miscellaneous expenses. Of this amount \$333.66 is admitted to be correct; the other items, including checking Bronx Parkway Commission plans, field inspection, for expenses of accounting (being one-half the total) amounting in all to \$1,203.43, are objected to by the municipalities interested on the ground that to allow them would impose a double charge for certain engineering expenses. The point was considered well taken. The Vroman contract provided that all engineering, superintendence, etc., necessary or required in respect of this crossing should be made by the railroad company, the inference being that no additional charge for any of these purposes should be made. The railroad is no more entitled to recover for such expenditure than would the municipality for similar service rendered by its engineering department; in respect of which latter reference is made to an early deter-

mination of the Commission in this very case: in the matter of claim of municipality for charging expenses of inspectors against the elimination of grade crossings in Mt. Vernon, the opinion being written by Stevens, then Chairman. The claim under consideration and any similar claim for future service of the kind mentioned must be disallowed.

Geo. H. Walker, attorney, for the New York Central Railroad Company.

Max Cohen, assistant corporation counsel, for the City of Yonkers.

Frank A. Bennett, corporation counsel, for the City of Mount Vernon.

VAN SANTVOORD, Chairman.— Under the original order in this case entered on September 12, 1907, as modified by further order therein of June 22, 1912, provision was made for the elimination of various grade crossings by streets in Mount Vernon of the tracks of the New York and Harlem railroad, under plans in said orders specified and approved, at an estimated aggregate cost of \$450,000, of which amount \$36,900 was estimated as the cost of elimination of the grade crossing at Fleetwood avenue alone. If the work had proceeded under the determinations thus made, the statutory share of the railroad corporation in the estimated cost of the Fleetwood avenue elimination would have been the sum of \$18,450, and the remainder of said cost would have been borne equally by the municipality and the State of New York in the sum of \$9,225 each. But in the general development of its broad and far-reaching plans, the Bronx Parkway Commission became convinced that a proper treatment of the subject demanded a more elaborate and ornamental structure than and at a different location from that which would result under the original orders referred to. Accordingly, with the knowledge of this Commission, the Bronx Parkway Commission made an agreement with the cities of Mount Vernon and Yonkers and the New York Central Railroad Company whereby, among other things, said Commission and the two municipalities agreed to assume, pay, and discharge all the cost of a proposed viaduct at Broad street in Mount

[Vol. 14]

Public Service Commission, Second District

Vernon, designed to take the place of the overhead crossing at Fleetwood avenue provided for in the first above mentioned orders, in excess of the sum of \$27,675, being the aggregate of the statutory shares of the railroad company and of the State of New York, respectively, in the originally estimated cost of the proposed Fleetwood avenue elimination: it being expressly understood and agreed that the total share of the cost of the completed project to be paid by the State of New York shall not exceed the sum of \$9,225, and that of the railroad company the sum of \$18,450.

The agreement further contemplated that all the work provided for under the modified plan should be done by and under the direction of the Bronx Parkway Commission. This Commission was fully aware of the understanding between the parties, which indeed sought from the Commission its express approval of the said agreement before execution thereof. The Commission held that it was without authority to sanction an agreement by the terms of which a corporation not subject to its jurisdiction (in this case the Bronx Parkway Commission) would become clothed with full power to pass upon and finally determine the sufficiency of work, the direction of which is by statute expressly delegated to this body alone. The interested parties accordingly were instructed that this Commission must look to the railroad company as the responsible agency for carrying out the project, thus reserving unimpaired its statutory authority and duty in the matters of direction of the work and accounting of the cost thereof. Upon this express understanding the Commission found no objection to the making of the agreement between the parties, of which, however, for the reasons stated, it gave no formal approval, and a further amendatory order providing for the construction of an overhead bridge with graded approaches at Broad street, Mount Vernon, instead of at Fleetwood avenue, estimated to cost a very considerable sum in excess of the estimated cost of the first proposed over-crossing at Fleetwood avenue, and with the shares of the railroad company and the State respectively limited as above indicated, was duly made and entered by this Commission under date of December 16, 1915.

In the orderly development of the procedure thus instituted, in the Spring of 1916 there was presented to the Commission for its approval a proposed contract with Guy Vroman, civil engineer, covering preparation by Mr. Vroman "of all plans, specifications, and estimates, for all engineering, superintendence, etc., necessary or required in respect of the overgrade crossing to be built in the line of Broad street, Mount Vernon." The cities of Mount Vernon and Yonkers and the Bronx Parkway Commission were the other parties to this contract, which was approved by this Commission at the request of the New York Central Railroad Company.

In an intermediate accounting of expenditures thus far made in connection with this project, the railroad corporation has submitted a charge of \$1,537.09 in the aggregate for what may be termed engineering and miscellaneous expenses. Of the total amount claimed, \$333.66, for the most part covering work performed prior to the making of the Vroman contract above mentioned, is conceded by all in interest to be a proper charge; and the same accordingly is hereby allowed. The remainder of the claim includes the following:

For checking Bronx Parkway Commission plans....	\$656 49
For inspection in the field.....	501 81
For expenses of accounting (that part of the amount claimed for this particular expense and not con- ceded by the cities, being one-half of the total)....	45 13
	<hr/>
	\$1,203 43
	<hr/>

The two municipalities object to these items on the ground that their allowance would result in imposition of a double charge for certain engineering expenses. I believe the point is well taken. When the Commission was requested by the railroad company to approve the Vroman contract with its provision that it covered "all engineering, superintendence, etc., necessary or required in respect of the overgrade crossing at Broad street," I considered it was a manifest inference that no additional charge for any of the

[Vol. 14]

Public Service Commission, Second District

services specified and referred to should be made by the railroad company. The latter has explained its inclusion of the engineering charges as having been occasioned by its understanding of the Commission's ruling that it — the railroad company — would be held responsible for the proper conduct of the work. But here the railroad company is not only "presumed" to know the law, because in view of the particularly able counsel which represents and (at least presumably) guides it in these matters, the Commissioner in charge is convinced that it *actually* knows the law. Accordingly, when with full knowledge that this Commission had no authority to relieve the railroad company of its general responsibilities in the premises it recommended for approval by the Commission a contract which provided for "*all* engineering and superintendence" required in the matter, the Commission, as well as the municipalities, naturally supposed that the railroad company was willing to rely upon the professional skill of the engineer contracted with, and thus assumed any possible risk in the matter of satisfying the supervisory demands and exactions of the engineers of this Commission; and so far as it might feel called upon to scrutinize plans, check up specifications, and inspect work, any such attention to the work must be deemed as having been given for its own especial satisfaction, complacency, and reassurance. It is no more entitled to recover for such expenditure than would the municipality for similar service rendered by its engineering department; in respect of which latter reference is made to an early determination of the Commission in this very case in passing upon precisely such a claim as that last suggested (see epistolary mem. of this Commission dated April 4, 1911, in the matter of claim of municipality for charging expenses of inspectors against the elimination of grade crossings in Mount Vernon; Stevens, Chairman).

The claim under consideration and any similar claim for future service of the kind mentioned must be disallowed.

All concur; Commissioner Emmet absent.

**Petition of the KINGSTON GAS AND ELECTRIC COMPANY for
Authority to Acquire All of the Capital Stock of Ulster Elec-
tric Light, Heat and Power Company and 775 Shares of the
Capital Stock of Upper Hudson Electric and Railroad Company**

Case No. 5893

(Public Service Commission, Second District, December 27, 1917)

A domestic gas and electric corporation which is owned by a foreign holding corporation seeks authority to acquire all the capital stock of another similar domestic company and a majority of the capital stock of a second similar domestic corporation.

Early in 1916 a foreign corporation known as the American Gas Company, without securing the consent of the Commission, acquired as a holding company the entire outstanding capital stock of the Ulster Electric Light, Heat and Power Company, a domestic corporation, for \$30,000. It also secured a majority of the entire capital stock of the Upper Hudson Electric and Railroad Company, a domestic corporation, the object being to consolidate the lighting interests in a large area of country. The purchases by the American Gas Company were in violation of the statutory prohibition that no holding company shall take or hold more than ten per cent of the total capital stock of any domestic gas or electric corporation, and were also in violation of the provision that no such corporation shall directly or indirectly acquire the stock or bonds of any similar corporation unless authorized so to do by this Commission. In May, 1916, the American Gas Company notified this Commission of the appointment of one of its employees as manager of the Upper Hudson Electric and Railroad Company. The Commission inquired as to why the fact was brought to its attention; under date of May 10, 1916, the Commission was advised that the American Gas Company owned a controlling interest in the Upper Hudson Electric and Railroad Company and had charge of the business of that company. This was the first notice the Commission received of the unauthorized and illegal purchase of the stock.

Upon the testimony adduced the Commission determines that there has been a failure to show that the proposed purchases will advance the public interests. The manifest legislative intent to restrain foreign holding companies from improper and oppressive control of capital invested and corporate privileges created under New York State laws imposes upon the Public Service Commission the most careful and searching exercise of discretion in passing upon an application by a domestic electric company, which corporation is controlled through ownership of its capital stock by a foreign holding company, for leave to purchase a con-

[Vol. 14]

Public Service Commission, Second District

trolling interest in another domestic electric company. The purpose of the American Gas Company includes obviously the passing of the control of the purchased corporation to a foreign holding company against the open opposition of the minority stockholders and would be an improper exercise of discretion by the Public Service Commission. Petition denied.

W. M. Wherry and Lewis E. Carr, for petitioner.

J. M. Sheehan, for opposing stockholders.

VAN SANTVOORD, Chairman.—The Kingston Gas and Electric Company (hereinafter referred to as the Kingston Company) is a domestic corporation located at Kingston, in Ulster county, with outstanding capital stock in the amount of \$700,000, all of which capital is and since the organization of the company in 1902 has been owned by the American Gas Company.

The American Gas Company is a foreign holding company, which owns the capital stock of some fifteen or more gas and electric corporations operating at different localities in various States.

The Ulster Electric Light, Heat and Power Company (hereinafter referred to as the Ulster Light Company) is a domestic corporation located at Saugerties, in Ulster county, some ten or twelve miles distant from Kingston, with outstanding capital stock in the sum of \$30,000.

The Upper Hudson Electric and Railroad Company (hereinafter referred to as the Upper Hudson Company) is a domestic corporation located at Catskill, in Greene county, about twenty-two miles from Kingston. It has outstanding \$150,000 in capital stock.

In the early part of 1916 the American Gas Company, without the knowledge or consent of this Commission, assumed to acquire by purchase the entire outstanding capital stock of the Ulster Light Company, paying therefor the sum of \$30,000; and also 775 shares, being slightly more than a majority of the entire capital stock, of the Upper Hudson Company, paying therefor at the rate of \$90 per share. The object of the American Gas Company in undertaking these purchases was to consolidate the lighting interests in the area of operation embraced by the three com-

panies, through common ownership by the holding company, which during fifteen years preceding had owned all of the stock of the Kingston Company. While the record discloses and this Commission is satisfied that the American Gas Company acted openly and in good faith in the matter of these purchases, it is nevertheless the law of this State that, *first*, no holding company, domestic or foreign, shall purchase, acquire, take or hold more than 10 per cent of the total capital stock of any domestic gas or electrical corporation (with certain exceptions that are not germane to the particular point now under consideration); and, *second*, no gas corporation or electrical corporation shall directly or indirectly acquire the stock or bonds of any other corporation engaged in the same or a similar business, unless authorized so to do by this Commission. In May, 1916, the American Gas Company notified this Commission of the appointment of one of its employees as manager of the Upper Hudson Electric and Railroad Company, and, in reply to our inquiry as to why the fact was thus brought to our attention, under date of May 10, 1916, the Commission was advised that "The American Gas Company owns a controlling interest in the Upper Hudson Electric and Railroad Company and has charge of the business of that company." It was through this correspondence that this Commission received its first notice of the unauthorized and illegal purchase of the stock in question. The transaction of course was a nullity, and after further correspondence on the subject, followed by a conference between a member of this Commission and representatives of the American Gas Company, application was duly made by the Kingston Company for leave to purchase the stocks in question from M. M. Stroud, who in the meantime had taken title to the larger part of the stocks mentioned, and from certain other officials of the American Gas Company who, respectively, had taken and held five shares of stock in each case to qualify as directors of the two companies respectively. Mr. Stroud is president of the American Gas Company, and, although he states that he paid for these stocks with his own money, undoubtedly took title in the interest of his corporation — it being alleged in the petition that "the shares of

stock of each of said corporations (referring to the Ulster Light Company and the Upper Hudson Company) were not acquired for the individual interests of the persons so acquiring them but for the purpose of having the properties operated in conjunction with the Kingston Gas and Electric Company ultimately." The petition further alleged that if the three operating companies named can be treated as a unit in the territory supplied by them, and the engineering and practical problems therein treated as a unit for the entire territory, it is believed that the capacity for service of the three plants will be increased, additional electrical energy become available, and economies introduced which will tend to both improve the service and eventually result in decreasing rates to consumers. The object of the proceeding was further stated by the president of the American Gas Company in his testimony at the hearing as follows:

"Q. Mr. Stroud, have you ever requested the owners of the remainder of this stock (that of the Upper Hudson Company), the stock in excess of 775 shares that the American Gas Company owns, that you ever requested them to join with you in a consolidation or merger of these companies? A. No, sir. Q. You wish to effect such a consolidation or merger, do you not? A. Eventually. Q. Do you wish to effect it now? A. I have no definite plans at present. Q. Then what is your purpose now in seeking to have the Kingston Company acquire the 775 shares? A. So as to legalize the ownership by the Kingston Company so that the general control and the general advantage of such control can be gotten by all of that district and the Catskill Company in addition will get the advantage of such control."

Restraints upon corporate purchases of the capital stock and securities of gas and electric corporations are found in section 70 of the Public Service Commissions Law, which voiced the first legislative prohibition in this State of further control of operating light companies by so-called holding companies, which latter were forbidden to acquire more than 10 per cent of the capital stock of our domestic operating companies. And as a further safeguard against what at least was then considered improper

ownership and exploitation of domestic lighting companies by other corporations, purchase even by a domestic operating company of the capital stock and bonds or of the property of a corporation in precisely the same line of business was made contingent upon formal approval by this Commission. Similarly, if a holding company at the time of the enactment of the statute under consideration was the owner and holder of a majority of the capital stock of a domestic gas corporation or electric corporation, purchase by said holding company of even one additional share of such stock (the right to acquire such additional stock under the circumstances being one of the exceptions to the general rule above referred to) was likewise conditioned upon the approval of this body. So that in the case now before us the question is not alone whether the act is permitted by law, but whether under all the circumstances of the case it commends itself to the dispassionate judgment of a regulative body as being in the public interest — or at least not contrary thereto.

There is no doubt that the Kingston Company, with the consent of this Commission, may lawfully purchase and hold the stocks now sought to be acquired by it. All three corporations are operating companies, organized under the laws of this State, so that the prohibition against acquisition by certain corporations of more than 10 per cent of the capital stock of a domestic operating gas or electric corporation does not apply. There remains to consider only whether reasons exist why in the proper exercise of the discretion conferred upon it this Commission should withhold its approval of the proposed purchases or of either of them.

The views of the writer of this opinion as to intent of the Legislature in respect of the acquisition by holding companies of the control of our domestic operating companies have been freely expressed in his dissenting opinion in the so-called Frost Gas case (decided January 25, 1917) and the Lockport Light Company case (decided June 19, 1917). And while I consider the present case properly to be differentiated from those last mentioned, in that the Kingston Company is a domestic corporation, in every respect subject to the jurisdiction of this Commission, as

[Vol. 14]

Public Service Commission, Second District

are those corporations the control of which it now seeks to acquire, thereby eliminating objection to what is proposed on the score of legality alone, the manifest legislative intent to restrain foreign holding companies from improper and oppressive control of capital invested and corporate privileges created under our own State laws imposes upon us the most careful and searching exercise of discretion in passing upon applications of this sort.

As to the proposed purchase by the Kingston Company of the capital stock of the Ulster Light Company there seems to be no objection raised, and we are of opinion that the same properly may be approved. But purchase by the Kingston Company of stock of the Upper Hudson Company is strenuously opposed by practically all of the minority interests, amounting to 712½ shares. It is alleged, and seems to have been established, that following acquisition of said stock by the American Gas Company, six officers or employees of that corporation were made directors of the Upper Hudson Company, the total number of directors being seven; that taking advantage of an existing by-law of the Upper Hudson Company an executive committee of three, consisting of the president, general manager, and another officer or employee of the American Gas Company, thereafter exercised the full powers of the board of directors of the Upper Hudson Company, which latter seems to have held few if any meetings; and all meetings of such executive committee were held in Philadelphia; that financing, engineering, and, in fact, the entire general management of the Upper Hudson Company were taken over by the American Gas Company under an agreement entered into by the board of directors of the controlled company, constituted as above, whereby 3 per cent of the gross receipts of the Upper Hudson Company was to be retained by the American Gas Company as compensation for its services and in lieu of salaries of executive officers. And it is alleged that while the American Gas Company had expressed its willingness to consider purchase of the minority stock in the Upper Hudson Company, the best offer which had been intimated was \$90 per share — whereas the minority interest read into the record its expressed willingness to buy or sell at \$150 per share,

which it insisted was a fair value; and finally that under present conditions, which naturally would be unchanged by the mere transfer of legal title of the stock involved from Mr. Stroud as president of the American Gas Company to the Kingston Company entirely owned by the other corporation, the Upper Hudson Company, organized under the laws of this State and subject to the jurisdiction of this Commission, had become and would continue a mere appendage of a foreign holding company, which through a continuance of its extra-territorial control was really attempting to force a consolidation upon unwilling minority interests whose rights were being ignored.

While we do not accept all the conclusions of these minority interests as sound in either law or equity, we are unhesitatingly of opinion that under existing conditions as disclosed in the record and herein superficially referred to there is no proof in the case that the public interest will be advanced by approval of the proposed purchase. Ordinarily such purchases are justified by alleged economies in operation following a merger which is predicated as an essential part of the project. But as matters stand there can be no merger in this case until the minority interests shall have been acquired; no proposition for a merger or consolidation of the Kingston Company with the two others mentioned has ever been made by the present controlling interests, and it is expressly stated that while the American Gas Company desires to effect such consolidation or merger "eventually," it has no definite plans in regard thereto at present. In short, we are not convinced from the testimony in the case that under existing conditions, with a hostile minority in open opposition to what is admittedly foreign holding company management of domestic gas and electric enterprises, to legalize the continuance of such an unsatisfactory state of affairs through authorization of something merely not in itself illegal would be a proper exercise of discretion by this body. Approval of the proposed purchase by the Kingston Company of the 775 shares of stock of the Upper Hudson Company accordingly should be denied.

All concur; Commissioner Emmet not present.

[Vol. 14]

Public Service Commission, Second District

Petition of the TOWN BOARD AND SUPERINTENDENT OF HIGHWAYS OF THE TOWN OF CORNING, Steuben County, under Section 90 of the Railroad Law for a Determination as to the Manner in Which Fenderson Street in Said Town Shall Cross the Railroad Operated by The Delaware, Lackawanna and Western Railroad Company

Case No. 6044

(Public Service Commission, Second District, December 27, 1917)

The policy of the State is the gradual abolition of grade crossings and should be kept in view.

The local authorities of the town of Corning, Steuben county, seek to have a street known as Fenderson street cross the tracks of the Delaware, Lackawanna and Western Railroad Company in the town of Corning at grade, but the railroad company objects and insists that the street be carried across the tracks by means of a proper bridge and approaches thereto. The only cases in which grade crossings are allowed to be created are those involving a maximum of convenience and necessity and a minimum of danger, or under circumstances which constitute a real public emergency. Nothing of this sort is herein shown to exist. Under the circumstances of this case the grade crossing is denied and the crossing is directed to be made by means of a bridge and the approaches thereto.

Geo. Stranbinger, Supervisor, for the Town of Corning.

G. W. Cheney for the Painted Post and Corning Improvement Company.

Ross M. Lovell, of Stanchfield, Lovell, Falck & Sayles, for the Delaware, Lackawanna and Western Railroad Company.

VAN SANTVOORD, Chairman.— This is an application by the town board and superintendent of highways of the town of Corning, Steuben county, for a determination by this Commission as to the manner in which a newly laid out highway in said town shall cross the tracks of the Delaware, Lackawanna and Western Railroad Company.

The Delaware, Lackawanna and Western railroad in the vicinity of the proposed crossing point consists of two main line, high speed, tracks. It appears that for a considerable number of years there was a private or farm crossing at or about where Fenderson street has been laid out. On account of the fact that the use of this crossing was becoming general, the railroad company removed the crossing plank and fenced its right of way at the point; so that no crossing facilities exist there at the present time.

At the hearing in the case the petitioner town at first disputed the fact that this had been a private crossing, but later this fact was conceded, and as well that the railroad company had the right to close the crossing.

At the point under consideration the tracks of the railroad run in an easterly and westerly direction. Fenderson street runs north and south. About 200 feet west of Fenderson street is the boundary line between the towns of Corning and Irwin. Alongside the boundary in the town of Irwin is the village of Painted Post, and Hamilton street in this village crosses the railroad at grade at a point about 1,180 feet west of Fenderson street. North of the railroad this street (there designated as the "Old road") curves to the right and east, and, running roughly parallel with the railroad, is intersected by a street known as the Balcom Lane, which crosses the railroad at grade at a point about 1,745 feet east of Fenderson street, with a resulting distance between the two grade crossings of about 2,875 feet. The land in this vicinity is generally low, the tracks being on an embankment about six or seven feet high. South of the tracks the locality is built up, but north of the tracks there are only about half a dozen houses between the railroad and the above mentioned continuation of Hamilton street, known as the "Old road," along which there are about ten houses: making altogether some sixteen houses north of the tracks. While there is not direct testimony on the subject, at least it may be inferred that the adjacent land north of the railroad has been laid out by a real estate improvement company with the object of selling lots in addition to those already disposed of. Significant references to such an enterprise are found

in the minutes at pages 10, 11, 15, 20, and 21. At the foot of Balcom Lane, about one-half mile from and on the south side of the railroad, is a schoolhouse, and one of the main arguments in favor of a crossing at Fenderson street is to give children living on the north side of the tracks a convenient and short route to the schoolhouse. If they are unable to cross at Fenderson street, then they must go either by way of the "Old road" easterly to the Balcom Lane and thence southerly, crossing the tracks at grade; or proceed westerly to Hamilton street in the village of Painted Post, crossing the railroad at grade, and then go easterly to the schoolhouse. In the former case the distance is about the same as via Fenderson street; in the latter case it is about one-half mile longer. Of course, children living between the railroad and the "Old road" could cross immediately at Fenderson street, whereas at present they must first go to the "Old road," covering the same distance upon their return. This extra travel should be added to either one of the above alternate routes in a statement of their comparative lengths.

The supervisor makes the statement that many people bought building lots north of the tracks in the expectation and belief that the old crossing at or about at Fenderson street was to be maintained, but it was admitted that no assurances to this effect had been given by the railroad company.

The Delaware, Lackawanna and Western railroad is one of the main trunk lines between New York and Buffalo. Some of its trains run at very high speed through this locality, and the testimony shows that during several days just previous to the hearing there was an average of twenty-three and one-half train movements each way per day — forty-seven movements in all; of which twelve were passenger and express trains. It is fair to assume that on account of the importance of this railroad the number of movements will increase rather than decrease in the future.

The desire of the town to carry Fenderson street across the railroad at grade is opposed by the railroad company on the grounds of both safety and facility in operation. It urges that having made heavy expenditures in eliminating dangerous grade crossings

it is averse to the creating of new conditions which sooner or later inevitably will impose upon it a similar burden in undoing what is now proposed. It points out that through grade revision between Clark's Summit and Halstead on its lines in New York and Pennsylvania, a distance of forty miles, and on its changed line in New Jersey for a distance of about thirty miles, there remains not a single grade crossing, which admirable result has been obtained only through expenditure by it of very large sums of money.

Drainage conditions at the point involved will not permit an undergrade crossing, so that the project of a new thoroughfare involves choice between carrying Fenderson street across the railroad at grade, or by means of some form of overhead structure. The cost of a suitable bridge and approaches has been estimated at \$60,000. Although the railroad company, while naturally averse under existing conditions to embarking upon further large expenditures not actually addressed to improvement in transportation facilities, for the sake of both safety and flexibility in operation would prefer that more expensive but essentially safe method of an overhead structure to the dangers and operating hindrances of another grade crossing, it appears that the municipality is not willing to assume its statutory share of the cost of an overhead crossing. For this reason presumably it urges approval of the projected grade crossing, which it seeks to justify on the score of public convenience and necessity. But in a very late case (Application of Town of Pitcairn, etc., case No. 6211, decided December 18, 1917) this Commission pointed out the considerations which in its opinion properly control in determinations of this kind, which so far as it is possible to summarize in a single proposition have been happily phrased by the Appellate Division in its conclusion that "considerations serving public convenience only must yield to those which affect public safety." Matter of Town Board of Royalton, 138 App. Div. 412. And in its case No. 5660 — Application of the State Commission of Highways for the elimination of a grade crossing involving the towns of Richmondville and Cobleskill, decided March 26, 1917 — in which

practically the same considerations, including that of the convenience of school children, were involved, as in this case, this Commission observed "These and other arguments were given due weight by the Commission; but in such a case the wishes and convenience of the few should yield to the safety and welfare of the many in carrying out the manifest intent of the law, that whenever and wherever possible dangerous grade crossings of steam railroads should be eliminated."

As before stated, the record shows and implies that the necessity for a new crossing is predicated upon (1) the convenience of children who live north of the tracks and attend a school located to the south of the tracks; (2) the proximity of a very considerable building area which would become more available with improved highway facilities; and (3) the convenience of some sixteen resident families.

The Commission is of opinion that none of these considerations is nor are all of them together of sufficient weight to justify disregard of the existing state policy in respect of grade crossings, namely, in favor of the gradual abolition of those now existing, and against the construction of additional ones except in cases of both a maximum of convenience and necessity and a minimum of danger, or under circumstances which constitute a real public emergency. In the case of a new highway carried over a railroad whether at, over, or under grade, the cost of constructing the crossing is imposed in equal parts upon the municipality and the railroad corporation. But once such new highway shall have been constructed with a crossing at grade, the latter becomes subject to elimination and an over or undergrade crossing thereupon ordered is at the cost of the railroad which pays one-half, and the municipality and the State which respectively pay one-quarter. To create a situation which in observance of state policy sooner or later would inevitably result in imposing upon the State a financial burden which would not attach if the over or under method of crossing should be determined in the first instance, is not compatible with a proper concern for the public treasury by a department of the state administration to which has been entrusted the

broad discretionary powers reposed in this Commission. On this account, as well as because of the other reasons stated, we are unable to approve the project of a grade crossing herein, and on the contrary determine that the manner in which Fenderson street shall cross the Delaware, Lackawanna and Western railroad, in the town of Corning, shall be by an overgrade structure of such kind, type, and details of construction, and with such approaches and the graded length thereof as shall be particularly specified and provided in a further order herein to be made and entered upon application of the parties hereto or of either of them upon due notice given.

All concur; Commissioner Emmet absent.

In the Matter of the Complaint under Sections 71 and 72 of the Public Service Commissions Law of the TRUSTEES OF THE VILLAGE OF SOUTH GLENS FALLS against UNITED GAS, ELECTRIC LIGHT AND FUEL COMPANY OF SANDY HILL AND FORT EDWARD as to Price of Gas

Case No. 6256

(Public Service Commission, Second District, December 27, 1917)

A franchise restriction is good as between the parties but is not controlling as against the State.

In June, 1917, the United Gas, Electric Light and Fuel Company of Sandy Hill and Fort Edward filed its tariff increasing its price for gas in the village of South Glens Falls from one dollar and twenty-five cents per 1,000 cubic feet to one dollar and sixty cents. The village then began the present proceeding against the gas company upon the ground that the franchise under which the corporation was operating in the village limited the price to one dollar and twenty-five cents per 1,000 cubic feet for gas consumed for lighting purposes. *Held,*

That there is no provision in the Transportation Corporations Law or in the general laws of the State authorizing the board of trustees of an incorporated village to fix rates for gas or electricity in a franchise granted by such board.

[Vol. 14]

Public Service Commission, Second District

That an incorporated village has no authority to fix rates for gas or electricity in a franchise granted by the proper village authorities unless that power has been specifically conferred upon such authorities by the Legislature.

That where there is a provision in a franchise granted by the board of trustees of an incorporated village fixing rates for gas or electricity such rates are controlling as between the parties until such time as the State shall exercise its power to revise them in the manner provided by law.

Complaint filed November 2, 1917.

Answer filed December 5, 1917.

Hearing held at the office of the Commission in the city of Albany on December 14, 1917.

McKelvey & Stenacher, by Lawrence B. McKelvey, for the complainant.

David Fisk for the Village of Hudson Falls.

Rogers & Sawyer, by Erskine C. Rogers, for the respondent.

CARE, Commissioner.—In the month of June, 1917, the respondent filed with this Commission its tariff, as required by law, increasing its price for gas in the village of South Glens Falls from one dollar and twenty-five cents per 1,000 cubic feet to one dollar and sixty cents per 1,000 cubic feet. Thereafter, and in the month of November, 1917, the complaint in this case was filed with the Commission by the trustees of the village of South Glens Falls, on the ground that the increase was unlawful because of the fact that the franchise under which the corporation was operating in the village provided that it should only charge one dollar and twenty-five cents per 1,000 cubic feet for gas consumed for lighting purposes. Notwithstanding this provision in the franchise, the company has increased its rates as hereinbefore set forth and is now charging the rate complained of. At the hearing it was stated by counsel that the village did not propose to contest the increase in rates in the event that the Commission

should hold that it might permit the company to charge a higher rate than that set forth in the franchise. Similar complaints have been filed with the Commission by the villages of Fort Edward and Hudson Falls, and the same counsel represents them. It was also stated by counsel on the hearing that these villages would probably abide by the determination in the South Glens Falls case.

There is no provision in the Transportation Corporations Law which in any way seems to justify the contention that a municipality has the right to permanently fix in a franchise the rates which a gas or electric light company shall charge in the territory covered by the franchise. In addition to this, there is no statute which has been called to the attention of the Commission which in any way fixes the rate to be charged for gas sold in the village of South Glens Falls or the other villages in question except as the same is governed by the Public Service Commissions Law. In this respect the situation is quite different from that relating to street railroads in which the law specifically provides for a certain rate of fare within the limits of an incorporated city or village, which, however, is subject to modification by the Legislature or this Commission. We have quite recently decided (Petition of Huntington Railroad Company for Permission to Increase Passenger Fares, decided in November, 1917) that municipalities have no power to prescribe a rate in a franchise which shall always be controlling so as to deprive the State of the power to regulate the fare to be charged by a street railway. This decision pointed out that the franchise provision was binding until such time as the State interfered and prescribed a different rate. This applies with equal force to gas and electric light companies. The law requires gas and electric light corporations to file their tariffs with the Commission. In the event that any increases are made in their rates, a complaint may be made against the company in the manner provided in the Public Service Commissions Law. If, after investigation, it is determined that the increased rates are unreasonable, the Commission has the power to revise them and reduce them. On the other hand, it also has the power to

[Vol. 14]

Public Service Commission, Second District

increase rates provided the company can show that it is not earning a sufficient amount to give it a reasonable return upon the value of the property employed by it in the public service.

We have had our attention called by the complainants to but one case in support of their contention, namely, Rochester Telephone Co. v. Ross, 195 N. Y. 429. We have pointed out in the Huntington case why the doctrine of the Ross case is not controlling in a situation like the present one, and we reiterate it. Where there is a franchise restriction, it is good as between the parties, but is not controlling as against the State when relief is sought in the manner provided in the Public Service Commissions Law and the facts would justify granting the relief but for the condition in the franchise. Under the circumstances, therefore, we are of the opinion that the condition in the franchise granted by the Village of South Glens Falls to the United Gas, Electric Light and Fuel Company of Sandy Hill and Fort Edward is not controlling so as to prevent the Commission from authorizing an increase in that rate in the event that the company can justify such increase on the ground that it is failing to earn a fair return upon the value of its property employed in the public service. It appearing from the record in this case that the complainants intend to rely entirely upon the restriction in the franchise fixing the rate for gas in the village of South Glens Falls and do not propose to contest the reasonableness of the increased rate if that matter is decided adversely to them, it is our duty, for the reasons herein set forth, to dismiss the complaint, and an order to that effect will be entered in due course.

All concur except Commissioner Emmet, not present.

In the Matter of the Petition of GROTON ELECTRIC POWER CORPORATION under Section 68, Public Service Commissions Law, for Permission to Construct an Electric Plant in the Towns of Dryden and Groton, and in the Incorporated Villages of Freeville and Dryden, Tompkins county; and for Approval of Franchises Therefor from Municipal Authorities .

Case No. 6284

(Public Service Commission, Second District, January 3, 1918)

Construction of an electric plant should not be allowed until the petitioner has put itself into financial condition to construct and operate such plant.

The petitioner herein is what may be called an inchoate corporation, for while it appears that its proposed capital stock of \$20,000 has been entirely subscribed it nevertheless has not received from this Commission, nor has it sought, any authorization to issue such stock or any other form of capital securities. The facts herein show that public convenience and necessity both require that the enterprise proposed be carried to completion. *Held*, that the needs of the communities are such that the exercise of the franchises should be approved, but that the commencement of construction should not be authorized until the petitioner puts itself in financial condition to construct and operate under the franchises by obtaining suitable capital authorization from the Commission and by becoming a real corporation instead of merely the potential corporation which it now is.

E. H. Bostwick for the petitioner.

IRVINE, Commissioner.— This application, under section 68 of the Public Service Commissions Law, presents a case perfectly clear on the question of public convenience and necessity and the general practicability of the enterprise, but the corporate situation of the applicant is so peculiar that some explanation of the order granting the petition should be placed on record.

The applicant, the Groton Electric Power Corporation, seeks permission to construct an electric plant in the towns of Dryden and Groton, and in the incorporated villages of Freeville and

Dryden, all in Tompkins county, and for approval of franchises therefor granted by the town and village boards of the four municipalities. The petitioner has duly filed and recorded its certificate of incorporation in the office of the Secretary of State and in the office of the clerk of Tompkins county. It is nevertheless only an inchoate corporation, for while it appears that its proposed capital stock of \$20,000 has been entirely subscribed, it has not received from this Commission, nor has it applied for, any authorization to issue such stock or any other form of capital securities. It did apply to the Commission for permission to construct and for the approval of a franchise granted by the village of Groton. It appeared in that case that the village board of the village of Groton had undertaken to make a lease to the petitioner of a municipal lighting plant without authority by vote of the people. The application was denied solely because the Commission deemed such lease unauthorized by law under the circumstances. (Opinion No. 322.) The petitioner, however, had been placed in possession by the village and is apparently still operating therein as an agent of the village. It has no power plant of its own but is operating the Groton plant, and it was testified at the hearing that it could obtain any amount of power required for its new enterprise through the Ovid Electric Company, whose application under section 68 for the town of Lansing has been approved by the Commission. There are three possible sources of power to be reached through the Ovid company which is owned and controlled by the same interests as the Groton company. Regardless of the situation in the village of Groton, it is therefore practicable for the Groton company to fulfill its duties under the franchises involved in the present case.

The town of Dryden adjoins the town of Groton on the south, and the town of Groton adjoins the town of Lansing on the east. The village of Groton is almost in the center of the town. Within the town of Dryden are the incorporated villages of Freeville and Dryden. Freeville has four to five hundred inhabitants; Dryden from seven to nine hundred. Between these two communities and in the town is the George Junior Republic, with from twenty to twenty-five houses and the Republic Inn, a hotel of consider-

able size, which desires current for lighting and power. There is no electric service in either town or either village. There is a municipally owned acetylene gas plant in the village of Dryden but it is in bad condition; the village desires to abandon it and it has approved the petitioner's application. The chief object is to serve the two villages and the Republic community, but there are provisions in the town franchises for furnishing electric energy in the regions adjoining the proposed transmission line. These provisions are perhaps not of great importance because the Commission, in the exercise of its powers, could compel reasonable and proper service in the exercise of the town franchises.

The needs of the communities are such that the exercise of the franchises should be approved, but commencement of construction should not be authorized until the petitioner puts itself in financial condition to construct and to operate under the franchises by obtaining suitable capital authorization from the Commission and by becoming a real corporation instead of merely the potential corporation which it now is.

Chairman Van Santvoord and Commissioner Carr concur; Commissioners Emmet and Barhite not present.

In the Matter of the Complaint of HENRY C. DRAKE, as President of the Village of Fredonia, against THE NEW YORK CENTRAL RAILROAD COMPANY, Asking that Gates Be Provided and Maintained at a Crossing at Grade of the Valley Division of Said Company's Railroad and East Main Street, in Said Village

Case No. 6241

(Public Service Commission, Second District, January 10, 1918)

Circumstances under which a railroad company will not be required to erect gates at a crossing.

The village of Fredonia, N. Y., seeks to compel the New York Central Railroad Company to place gates at the single track crossing of its Valley branch, Erie division, over East Main street in that village. The crossing

[Vol. 14]

Public Service Commission, Second District

is now protected by a crossing-sign and by a crossing-bell electrically operated by trains as they approach the crossing. The station and freight offices are situated 270 feet from the crossing. *Held*, that an active flag-man on the crossing with an unobstructed view of the street in both directions would be more efficient than a man 270 feet from the street closing gates while he is unable to see any vehicle which might be approaching or know its rate of speed. Under these circumstances it would not seem advisable to direct the railroad company to erect gates at the point desired.

W. J. Westwood, attorney for complainant, Henry C. Drake, as President of the Village of Fredonia, who also appeared in person.

Locke, Babcock, Spratt & Hollister, attorneys for The New York Central Railroad Company.

Kenefick, Cooke, Mitchell & Bass, attorneys for Receiver Buffalo and Lake Erie Traction Company.

BARHITE, Commissioner.— This an application by the president of the village of Fredonia, N. Y., to compel the New York Central Railroad Company to place gates at the single track crossing of its Valley branch, Erie division, over East Main street in said village. This street is a part of the Buffalo and Erie highway, and is the main road for vehicles between Buffalo, New York, and the west. The crossing is now protected by a crossing-sign, as it appears somewhat improperly placed, and by a standard crossing-bell electrically operated by trains as they approach the crossing. The station and freight offices are situated 270 feet south of the crossing. At present there are eight regular trains per day, four passenger and four freight, operated over the road. North of the highway are two manufacturing plants on opposite sides of the railroad which obstruct the view of those who may approach the crossing, and are the occasion of some switching operations although no switch track passes over the street. The crossing-bell has been in position a little over two years. There is some dispute as to whether it has always been in order, but there

is no reason why it should not be kept in good working condition with proper inspection. The evidence is that it is examined every morning by a railroad employee. This bell is not a sufficient protection, especially to persons who may be riding in a close vehicle. Formerly the crossing was protected by a flagman who was employed at the station but who went to the crossing when necessary. This arrangement was not entirely satisfactory, as it is claimed the flagman was not always efficient and his signals at times were misunderstood. It may be said, however, that in these times of fast and careless driving neither gates nor any other device guarantees safety at a grade crossing. Attention may be called to the fact that if gates are placed at this crossing the village authorities cannot limit the speed of trains at this point to less than forty miles an hour. Without the gates the speed may be controlled to any reasonable limit. The petitioner proposes that the gates, if built, shall be operated from the station, 270 feet away. It would seem that an active flagman on the crossing, with an unobstructed view of the street in both directions, would be more efficient than a man 270 feet away from the street closing gates while he is unable to see any vehicle which might be approaching or know its rate of speed. To close a gate immediately in front of a rapidly moving automobile or one managed by a careless driver would be a source of danger rather than of safety. Under present financial conditions, and the conditions of operation which must necessarily govern the movement of the limited number of trains over this crossing, it would not seem advisable to direct the railroad company to erect gates at this point.

Chairman Van Santvoord and Commissioners Irvine and Carr concur; Commissioner Emmet not present.

[Vol. 14]

Public Service Commission, Second District

In the Matter of Marking Less Than Carload Shipments of Freight. Petition of C. C. McCain, Joint Agent of the Carriers, for Modification of Orders

Case No. 397

(Public Service Commission, Second District, January 15, 1918)

Marking packages of less than carload freight.

C. C. McCain, as joint agent for certain railroad companies of the State, has petitioned the Commission to revoke and cancel its orders of August 19 and September 17, 1908, as to marking packages of less than carload freight. In place of this rule he asks that each package or loose piece of freight in less than carload lots shall be legibly and durably marked with the consignee's name, station, town or city and state to which destined. *Held*, that the individual marking of each piece is unnecessary, uneconomical or even impracticable. Much may be accomplished by boxing, crating or bundling some commodities and marking each box, crate or bundle. Under existing conditions, until the return of normal conditions, the transportation of less than car load freight will be facilitated and a prompt delivery more nearly secured by rescinding the exceptions designated as *a*, *b*, *c*, and *d*, in the orders of August and September, 1908, above cited.

Henry Adams, General Freight Agent, for the Erie Railroad Company.

E. P. Bates, Assistant Freight Traffic Manager, for the Pennsylvania Railroad Company.

H. C. Burnett, Assistant General Freight Agent, for the Lehigh Valley Railroad Company.

R. L. Calkins, Freight Claim Agent, for the New York Central Railroad Company.

W. S. Kallman, Assistant Freight Traffic Manager, for the New York Central Railroad Company.

R. W. Davis, Freight Traffic Manager, for the Buffalo, Rochester and Pittsburgh Railway Company.

Edward S. Giles, Assistant General Freight Agent, for the Delaware, Lackawanna and Western Railroad.

A. B. Thompson, Freight Claim Agent, for the Delaware, Lackawanna and Western Railroad.

Lucius H. Kentfield, General Freight Agent, for the New York, New Haven and Hartford Railroad Company, Central New England Railway Company and New England Steamship Company.

G. Marks, for the New York, New Haven and Hartford Railroad Company.

C. W. Nash, Albany Chamber of Commerce, for various shippers.

W. B. Wackerhagen, for the Albany Hardware and Iron Company.

Harry E. Campbell, for the Campbell Architectural Iron Company, Inc.

George A. Collins, for Pillsbury Flour Mills Company.

E. W. Ladd, for Albany Builders Supply Company.

Captain L. S. Lansing for Transportation Branch, Ordnance Department.

Martin J. Lower, for International Harvester Company.

D. S. McKinley, for McKinley & Co.

E. T. Wareing, for John R. Jackson Tile Company.

IRVINE, Commissioner.— In 1908 the common carriers within the State adopted what was known as rule 3, and is now rule 3 of the official classification, requiring each package, bundle, or piece of less than carload freight to be plainly marked by brush, stencil, pasted label, or securely fastened tag, showing the name of consignee and the name of the station, town, or city, and the State to which destined. This rule contained other provisions not here material. Complaint having been made against certain

[Vol. 14]

Public Service Commission, Second District

carriers, the Commission, August 19, 1908, made an order requiring certain exceptions to this rule, as follows:

“(a) When articles are not boxed, barreled, crated, or sacked, and are shipped loose in pieces, or when pieces are wired or otherwise fastened together in lots or bundles, and the shipment consists of not more than ten pieces, lots, or bundles, at least two pieces, lots, or bundles in each shipment shall be marked in accordance with this rule; and when the shipment consists of more than ten pieces, lots, or bundles, one for every ten or additional part thereof shall be so marked, but not more than ten such markings shall be required for any shipment from one consignor to one consignee and destination. Each marking under this exception must show the total number of pieces, lots, or bundles in the entire consignment.

“(b) Flour, feed, cement, lime, or plaster, in sacks, bearing upon the package or shipping tag the name and address of shipper, printed, stamped, stenciled, or plainly written, when the shipment consists of not more than ten sacks, at least two sacks in each shipment shall be marked in accordance with this rule; and when the shipment consists of more than ten sacks, one for every ten or additional part thereof shall be so marked, but not more than ten such markings shall be required for any shipment from one consignor to one consignee and destination. Each marking under this exception must show the total number of sacks in the entire consignment.

“(c) Grapes, when shipped in lots of 10,000 pounds or more by one consignor to one consignee and destination, will be accepted without marking of packages.

“(d) Articles which are not classified or rated in carloads and are subject to less than carload rates for shipment in any quantity, and which are shipped loose in pieces or in packages from one consignor to one consignee and destination, and are loaded by shippers in cars to 30,000 pounds or the cubic capacity of the car, will be accepted without marking.”

By order made September 17, 1908, this requirement was extended to all other carriers within the State. Certain of the

carriers affected have applied to the Commission for a rescission of these exceptions, asserting that the present congestion of freight, causing efforts to require in all cases full loading of cars and other practices in the interest of prompt and economical transportation and delivery of goods, demand a separate marking of each piece of less than carload freight. It is contended that the practice of marking only certain pieces in a less than carload shipment of a number of pieces of the same kind results in a confusion of goods and serious loss to the carrier. There is evidence by several shippers that they have experienced no serious losses or damages through the operation of the rule. However this may be, the Commission is of the opinion that under existing conditions and until the return of normal conditions, the transportation of less than carload freight will be facilitated and its prompt delivery more nearly secured by rescinding the exceptions designated as *a*, *b*, *c*, and *d* in the orders of August 19, 1908, and September 17, 1908.

It is realized that in the multiplicity of commodities falling within rule 3 and especially those falling within exception *d*, experience may show that the individual marking of each piece is unnecessary, uneconomical, or even impracticable. It is believed that much may be accomplished by boxing, crating, or bundling some commodities and marking each box, crate, or bundle. Nevertheless experience will probably show that some exceptions to the general rule should be made.

It was admitted at the hearing that the practice as to shipping grapes is such as to render the broad rule impracticable. Apparently some other fruits are in the same category. It is expected that the carriers will promptly propose a reasonable exception to the rule in respect of these commodities. They should also be at liberty to make any other exceptions and modifications of the rule which experience shall prove to be wise and economical. The shippers should also be at liberty to apply to the carriers for exceptions and modifications, and to this Commission should the carriers refuse to comply with their requests.

Commissioners Carr and Barhite concur; Chairman Van Santvoord and Commissioner Emmet not present.

In conformity with the above opinion the Commission ordered as follows:

BY THE COMMISSION.— Certain railroad companies of the State, by their agent, C. C. McCain, in December last jointly petitioned this Commission to revoke and cancel its orders of August 19 and September 17, 1908, in respect of the rule for marking packages of less than carload freight, and asked that in place of the rule thus provided for it may be provided that each package or loose piece of freight, in less than carload lots presented for shipment shall be legibly and durably marked with the name of the consignee, station, town or city and state to which destined; and that other provisions of rule 3 of the official classification shall apply to such shipments.

A public hearing on said petition was held by this Commission in Albany on December eighteenth, at which those named above appeared and various statements and testimony of witnesses were presented. For reasons stated in an opinion of the Commission in this matter of this date it is

Ordered (1) That the orders of this Commission of August 19, 1908, and September 17, 1908, in this matter are hereby annulled.

Ordered (2) That the railroad companies named in said orders (as far as they now exist and under their present names) and all other railroads operating in the State of New York may adopt and put in effect on statutory notice the rule now existing and known as rule No. 3 of the official classification (copy of which rule No. 3 is filed in this office by R. N. Collyer agent, in P. S. C.—2 N. Y.—O. C. No. 44, pages 19 and 20).

Ordered (3) Said railroad companies may, under the statute (Pub. Serv. Com. Law, § 29, as amd. by Laws of 1914, chap. 240) file exceptions and modifications to said rule and shippers are hereby given notice that on refusal of said railroad companies to make exceptions or modifications applied for by said shippers petition may be made to this Commission, in specific instances, for a determination by the Commission that said exceptions or modifications shall be made.

EDUCATION DEPARTMENT

In the Matter of the Appeal of ELISHA SHEELEY from the Acts and Proceedings of a Special School Meeting Held in District No. 9, Town of Neversink, Sullivan County, Designating a School-house Site

Case No. 400

(Decided November 18, 1917)

The action of a consolidated school district taken at a special school meeting for the district in selecting a school-house site and voting an appropriation for a new school building thereon is invalid.

School district No. 9, town of Neversink, Sullivan county, is now a consolidated district consisting of the territory formerly included in districts Nos. 9 and 16 of that town. On January 24, 1917, a special meeting was held in the district for the purpose of selecting a school-house site and making an appropriation for the erection of a new school building on the site so selected. A subsequent special meeting was held because of a tie vote on rival propositions resulting at the first meeting. The second meeting was held January 24, 1917. A site was agreed on and the resolution for the appropriation of funds in connection therewith was adopted. The present appeal is from the action of the second meeting. Since the bringing of the appeal the Township School Law (Laws of 1917, chapter 328) has been enacted, giving to the town board of education authority to designate a new site for a school-house in the district. *Held*, that the authority is now in the town school board and that the action of the meeting should be set aside, and the town board of education is directed to proceed anew under the Township School Law to designate the site and to obtain the necessary appropriations for the acquisition of the same, and the erection of a new school building thereon. The site selected by the district meeting is found in any event unsuitable. Appeal sustained.

Carpenter & Rosch, attorneys for appellant.

John D. Lyons, attorney for respondent.

FINLEY, Commissioner.— School district No. 9, town of Neversink, Sullivan county, is a consolidated district, comprising the territory formerly included in school districts Nos. 9 and 16 of

such town. A special school meeting was held in the district on January 24, 1917, for the purpose of selecting a school-house site and voting an appropriation for the erection of a new school building.

It appears that on October 25, 1916, at a meeting called to consider the question of selecting a new school-house site, a committee was appointed for the purpose of recommending to the electors certain school-house sites which should be voted upon by the qualified electors of the district. Such committee made its report at a special meeting held December 29, 1916, and two sites were recommended for the consideration of the electors of the district. One of such sites was owned by the trustee, Abram D. Low, and the vote taken upon the selection of such site resulted in a tie. This meeting adjourned without the designation of a site.

The trustee thereupon called another special meeting for the purpose of designating a site and voting an appropriation for a new school building, to be held January 24, 1917. A resolution for the acquisition of the site owned by Mr. Low, the trustee, was submitted to the meeting and a vote taken thereon, and the resolution was adopted by a vote of twenty-seven to twenty-one.

This appeal is brought from the action of the meeting in designating such site. The appellants have based their appeal upon several grounds. It is alleged that the trustee unduly influenced the electors of the district in obtaining favorable action as to the site owned by him, and it is further contended that as trustee of the district he was not legally authorized to enter into a contract with the district for the sale of the land owned by him. It is also alleged that a number of persons voted in favor of the resolution who were not legally qualified electors of the district.

If it be determined that the site selected was unsuitable and therefore unavailable as a school-house site, it will be unnecessary to pass upon the other questions raised upon the appeal. It appears from the papers in the case and from the map which has been submitted by the respondent that the site selected is not conveniently accessible to a majority of the pupils of the district. The site is located in the southwestern corner of former district No. 16.

Because of the location of the highways the site selected would be conveniently accessible to the children residing in former district No. 16. It would, however, be much more inaccessible to the children in former district No. 9 than the present school-house in the district. A large majority of the children in the district reside in former district No. 9.

Upon the request of the parties to the appeal an inspector of the Department was directed to investigate the proposed location. In his report he states positively that the site is not located so as to accommodate properly a majority of the pupils of the district. He also indicates that the site is undesirable because of the proximity of the barns and stables of the former trustee, who owns the proposed site. He gives as his opinion that because of such proximity the site is unsanitary and is not a suitable location for a school building. Apart from the unfavorable report of the inspector, the evidence submitted is sufficient to sustain the contention as to the inaccessibility and unsanitary condition of the proposed site.

Since the bringing of the appeal the Township School Law (Laws of 1917, chap. 328) was enacted. Under this act (§ 343) the board of education of the town has authority to designate a new site for a school-house in a district. The law contemplates that the board of education shall in the first instance be responsible for the designation of new school-house sites. The law further provides that the board of education of the town may construct new school buildings when required for the proper accommodation of the school children of the town, under the conditions imposed by the law. In order to erect a building upon a site to be selected in school district No. 9, town of Neversink, the board of education will be required to proceed under the provisions of the Township School Law. Therefore it is advisable to set aside the action of the meeting in designating the site objected to by the appellant in this appeal and direct the town board of education to proceed anew under the Township School Law to designate a school-house site in the district and to obtain the necessary appropriation for the acquisition of the site and the erection of a new school building thereon.

[Vol. 14]

Education Department

The site selected by the district meeting is unsuitable for the needs of the district for the reasons above stated, and the board of education of the town should take such action as may be required to provide suitable and adequate accommodations for the school children of the district.

The appeal is sustained.

It is hereby ordered that the acts and proceedings of the special school meeting held in school district No. 9, town of Neversink, Sullivan county, on January 24, 1917, designating a school-house site and authorizing the levy and collection of a tax for the acquisition thereof, be and the same hereby are set aside.

In the Matter of the BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 1, TOWN OF DEERPARK, Comprising the City of Port Jervis and Constituting the City School District of Port Jervis

Case No. 398

(Decided November 20, 1917)

Authority of the mayor of Port Jervis to appoint qualified electors of the school district constituted by that city to fill vacancies in the board of education of the city school district of Port Jervis not caused by expiration of term.

The Commissioner of Education ordered before him D. C. Starks, Emmet A. Browne, M. E. Eccleston, Harry Barley, Robert Hendrickson, James Wylie and James Gillender, who were claimed to be members of the board of education of union free school district No. 1, town of Deerpark, constituting the city school district of the city of Port Jervis, Orange county, to show cause on Thursday, October 11, 1917, at the Commissioner's office in the city of Albany, why a determination should not be made as to the legal title of said James Wylie and James Gillender to hold their offices as such members, and why they should not be recognized as legally appointed members of the board.

On the return of the order it appeared at the hearing that the union free school district in question, No. 1, in the said town of Deerpark, comprises all of the city of Port Jervis and some of the territory outside of said city, that all the inhabitants of the city are within the boundaries of the district, and that the inhabitants of Port Jervis constitute the

greater part of the inhabitants of the district. The district in question was established under the Education Law.

On the enactment of chapter 786 of the Laws of 1917 the various methods regulating the selection of boards of education in the several cities of the State differed one from the other. The general plan in the bill referred to was to make no change in the method by which full term members of the board of education were chosen. The new statute specifically provides in various subdivisions for the continuance of the same method of choosing members of boards of education in the several cities that was in operation prior to the passage of the statute in question which is known as the City School Law. Under the provisions of section 866 of the City School Law it was obviously the intention of the Legislature that upon the occurrence of a vacancy in the office of a member of the board of education in any city there should be a uniform method of filling such vacancy temporarily in all the cities. The Legislature provided that such a vacancy should be filled by the mayor. In August, 1917, the annual meeting of the said district was held and subsequent to that meeting two members resigned, whereupon the mayor appointed the said James Wylie and James Gillender to fill the vacancies. The other members refused to recognize them as members of the board. *Held*, that under the City School Law where a vacancy occurs other than by expiration of term of office in the office of a member of a board of education in a city, such vacancy shall be filled by the mayor until the next annual school election. It clearly was the intention of the Legislature that this school district, formerly known as union free school district No. 1, town of Deerpark, should under the City School District Act be known as the city school district of Port Jervis, and that, therefore, the mayor of Port Jervis was authorized to make the appointments in question, and that the persons so appointed are legal members of such board and must be permitted to participate in the acts and proceedings of the board of education of the district.

FINLEY, Commissioner.— This proceeding was instituted by an order of the Commissioner of Education directing D. C. Starks, Emmet A. Browne, M. E. Eccleston, Harry Barley, Robert Hendrickson, James Wylie and James Gillender, members or alleged members of the board of education of union free school district No. 1, town of Deerpark, constituting the city school district of the city of Port Jervis, to appear before the Commissioner at his office in the Education Building in the city of Albany on Thursday, October 11, 1917, at 11 o'clock in the morning, to show cause why a determination should not be made as to the legal title of James Wylie and James Gillender to hold their offices as mem-

bers of such board of education, and why the other members of such board should not recognize them as legally appointed members of such board. All of the persons named appeared at the time and place designated, and Messrs. Starks, Barley and Hendrickson were also represented by attorney.

It appears from statements made at the hearing upon the return of the order and from the records of this Department that union free school district No. 1, town of Deerpark, Orange county, comprises all of the city of Port Jervis and some of the territory outside of such city. It is admitted that all of the inhabitants of the city are within the boundaries of the district, and that such inhabitants make up the greater portion of the inhabitants of the district. A small amount of the assessed valuation of the district is outside of the limits of the city. Such union free school district was established under the Education Law and up to the time of the enactment of the City School Law, being chapter 786 of the Laws of 1917, was subject to the provisions of the Education Law relative to union free school districts and boards of education therein.

When the City School Bill was before the Legislature the general and special laws in effect which regulated the selection of members of boards of education in the several cities of the State provided various methods of choosing such members. In some cities members of the board of education were appointed by the mayor. In other cities such members were elected by the people at a special school election held independently of the general or municipal election. In other cities such members were elected by the people at either the general or the municipal election held in the city. And in still other cities the members of the board of education were elected by the people at the time of the annual school election fixed by the Education Law. The general plan of this bill was to make no change in the method by which full term members of the board of education were chosen. Following out this plan, it will be observed, that section 866 of the City School Law specifically provides, in various subdivisions, for the continuance of the *same method* of choosing members of boards

of education in the several cities of the State that was in operation under the laws in force prior to the time when the City School Law became effective. It will also be observed that under the provisions of subdivisions 11 and 12 of said section 866, it was the intention of the Legislature that, whenever a vacancy occurred in the office of a member of a board of education in any city of the State, there should be a uniform method of filling such vacancy temporarily in all cities. Subdivision 11 specifically provides that if such vacancy occurs in a city in which the members of the board are elected "at a school or general or municipal election," the vacancy shall be filled by appointment by the mayor until the next annual school election, and that then the vacancy should be filled by the people at such election for the unexpired term. The same method is provided for filling a vacancy in a city in which full term members are appointed by the mayor, except that in such cases the mayor immediately appoints for the balance of the unexpired term. It was evidently the belief of the Legislature that it would be unwise to convene the voters of an entire city and incur the expense involved thereby to hold an election for the purpose of filling a vacancy in the office of a member of a board of education for a few months only. The Legislature provided that such vacancy should be filled by appointment by the mayor until the time fixed by law for the voters of such city to convene regularly for the election of full term members of a board of education and that at such time the vacancy should be filled for the full term.

In accordance with this general plan, full term members of the board of education of the city of Port Jervis are chosen by the people on the first Tuesday in August—the date fixed by the Education Law for holding annual school meetings.

Pursuant to the provisions of the said City School Law, the annual meeting in the Port Jervis district was held on the first Tuesday in August, 1917, at which two of the members of the board were elected. Since such election, James A. Orr and Charles I. Peck, former members of the board of education of the district, resigned their offices. The mayor of the city of Port

Jervis, acting under the provisions of subdivision 11 of section 866 of the Education Law as inserted by the City School Law, appointed James Wylie and James Gillender to fill such vacancies. Messrs. Starks, Barley and Hendrickson refused to recognize Messrs. Wylie and Gillender as the duly and legally appointed members of the board. The said Starks, Barley and Hendrickson attempted to organize the board by the election of a president, and further attempted to fill vacancies caused by the resignations of Mr. Orr and Mr. Peck.

The only question to be determined in this proceeding pertains to the power of the mayor to appoint persons to fill vacancies in the board of education caused otherwise than by expiration of term of office of the members.

It is provided in subdivision 11 of section 866 of the Education Law, as inserted by chapter 786 of the Laws of 1917, that "If a vacancy occurs other than by expiration of term of office in the office of a member of a board of education in a city in which such members are elected at a school, or general, or municipal election, such vacancy shall be filled by appointment by the mayor until the next annual school election is held, and such vacancy shall then be filled at such election for the unexpired portion of such term."

The respondents Starks, Barley and Hendrickson contend through their attorney that this provision does not apply to the Port Jervis union free school district because of the fact that the boundaries of such district are not coterminous with those of the city.

Section 2 of chapter 786 of the Laws of 1917 provides as follows:

"§ 2. City school district. Each city in which the school district boundaries are coterminous with the city boundaries is hereby declared to be a city school district. In a city in which the city boundaries and the school district boundaries are not coterminous the school district boundaries shall remain as they existed prior to the time this act takes effect and until such time as such school district boundaries may be changed as provided by law. In each city where the school district boundaries are not coterminous with

the city boundaries the school district which contains the whole or the greater portion of the inhabitants of the city shall be the city school district of said city and shall be subject to the provisions of this act."

The purpose of this section of the City School Law is clear to one who has a knowledge of the territory which was embraced in the unit of school administration in the several cities of the State under the laws in operation prior to the enactment of the City School Law in 1917. In some cities the territory embraced in the unit of administration for school purposes was coterminous with the territory embraced within the city itself. In certain other cities the territory included in the unit of school administration was greater than, or extended beyond, the boundaries of the city. In certain other cities, two school districts were embraced within or the greater portion of each extended into the boundaries of the territory of the city.

It was intended, under the provision of section 2 of the City School Law, to include within the unit of administration for school purposes in each city the territory which had formerly been included within such unit — no more and no less. It will be observed that this is exactly what the language employed in this section of the act accomplishes. The first sentence reads: "Each city in which the school district boundaries are coterminous with the city boundaries is hereby declared to be a city school district."

The two sentences which follow in this section must be considered together. In the first of these sentences it is stated that in those cities in which the city boundaries and the school district boundaries are not coterminous the school district boundaries shall remain as they existed prior to the time the City School Law took effect. This sentence was necessary to *define properly the territory* of each school district or each unit of school administration in those cities in which there are two school districts or two units of school administration, as, for instance, the city of Troy. One district includes that portion of the city of Troy which was formerly the village of Lansingburg. The other district or unit

of school administration includes the territory embraced in the city of Troy before the village of Lansingburg was annexed to the city of Troy. Lansingburg was annexed to Troy for municipal purposes only. The act of annexation continued the school system of Lansingburg as an independent unit of administration. The Lansingburg school district has continued to have its own board of education, superintendent of schools, and school system independently of what is commonly known as the school system of Troy. Similar conditions prevail in Glens Falls, Corning and other cities. Under this provision the *territory* of each district is preserved as it existed under the laws in force when the City School Law became operative. Had not this sentence been included in this section the law would have established a school system coterminous with the territory included within the boundaries of the city of Port Jervis, to be under the general direction of the board of education of that city, and would have excluded from the jurisdiction of such board and left outside of the administration of the school affairs in that city the territory in the former district which is outside of the city boundaries. This sentence simply provides that the *boundaries* of school districts which are not coterminous with the boundaries of a city *shall remain as they are* until modified as provided by law. This sentence does not provide that such a district shall be exempt from the provisions of the act; it does not provide that the administration of school affairs in such district shall be continued under the laws in force prior to the enactment of the City School Law. It may not be said that the sentence in question has the same effect as though it read "except that in a city," etc. If the Legislature had intended that cities having a school system of the type of Port Jervis were not to be governed and controlled by the City School Law, that body would have incorporated a provision in the law so clearly expressed that there could have been no doubt as to what the intention of the Legislature was. The Legislature would undoubtedly also have stated its intention in this respect in the usual manner in which exceptions are incorporated in statutes. It would have followed the plan which was pursued in this act

itself in stating exceptions. If such had been the intention of the Legislature, the title of the act would have read that the act was to provide a board of education in *certain* cities of the State, instead of providing, as it did, that such act was to provide a "*board of education in the several cities of the State.*" Instead of providing in section 865, as it did, that "A board of education is hereby established in each city of the state" it would have inserted immediately following such statement "except in those districts in which the school district embracing the city is a union free school district" or in some such similar language would have preserved the old form of administration prevailing in school affairs in such cities.

This measure was under consideration by the organized educational forces of the State for a period of five years and was before three successive Legislatures before it was enacted into law. Notice may be taken of the literature relating to the subject and this literature all shows that the general purpose sought was to bring the administration of school affairs in all the cities of the State under one simple, clear, uniform general law. This theory is supported by the fact that in the schedule of laws repealed all special acts and all provisions of city charters relating to the various school systems of the State are repealed. This theory is further supported by subdivision 3 of section 865 which makes provision for operating the school systems under the provisions of this law in all cities which are hereafter created by the Legislature, showing clearly the intention of bringing all cities under the provisions of this law.

The second of these sentences defines the territory which shall be regarded as the city school district in those cities in which the boundaries of the school district and the boundaries of the city are not coterminous. It expressly states that the school district which contains the whole or the greater portion of the inhabitants of the city shall be the city school district of said city. It follows, therefore, under this definition, that in a city in which there is but one school district and that school district extends beyond the boundaries of the city, the territory of the city school district is

to be the territory embraced in the former school district and that it is to be known as a *city school district*. This provision of law applies specifically to the city of Port Jervis. There is but one school district in that city. A portion of the district extends beyond the city. It was clearly the intention of the Legislature that this school district, formerly known as the union free school district No. 1, town of Deerpark, should, after the passage of this act, be known as the city school district of Port Jervis.

It is further provided, in section 3 of the City School Law, that "All acts or parts of acts, general or special, inconsistent with the provisions of this act, are hereby repealed." This provision has no special significance other than to show the legislative intent to substitute for all general laws and for special and local acts relative to city schools, the provisions of the City School Law.

Section 866 provides for boards of education the method of selecting their members, the terms of office of such members and the filling of vacancies in such boards. Subdivision 11 of such section confers upon the mayor the power to fill all vacancies occurring in the board other than by expiration of term. Section 233 of the Education Law, which provides for the filling of vacancies in union free school and other school districts, is clearly inconsistent with the above provision of the City School Law. Under the provisions of section 3 of the City School Law such section 233, so far as it applies to city school districts, is repealed because inconsistent with the provisions of such law relative to the filling of vacancies. The City School Law provides for an exclusive method of filling vacancies in boards of education in cities and city school districts and it repeals provisions in former laws providing for filling vacancies in boards of education in union free school districts, so far as such provisions may have been previously applicable to such cities and city school districts.

The Commissioner of Education may not, because of such implied repeal, exercise the power conferred upon him by subdivision 2 of such section and call a special election of the qualified electors of the Port Jervis city school district for the purpose of filling the vacancies in the board of education of such district.

The power of filling such vacancies is conferred expressly by the City School Law upon the mayor of the city of Port Jervis, and any intervention by the Commissioner of Education under such section 233 of the Education Law would be unauthorized and illegal.

It follows that the only provisions of law relative to the filling of vacancies in the board of education of such district are those contained in section 866 of the City School Law. By this section the mayor was expressly authorized to fill all vacancies caused otherwise than by expiration of term, and it therefore must be held that the persons appointed by him to fill such vacancies were legally appointed and that they now are duly authorized members of such board, having the same powers and entitled to the same privileges as members of the board elected at district elections.

The question has been raised as to whether it was within the province of the Legislature to confer upon the mayor of the city the power to appoint officers for the city school district, the boundaries of which are not coterminous with those of the city. In this connection it should be noted that a school district does not fall within the provisions of section 2 of article X of the State Constitution, known as the Home Rule clause. Such section provides that "*All city, town and village officers, whose election or appointment is not provided for by this Constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof, as the Legislature shall designate for that purpose. All other officers, whose election or appointment is not provided for by this Constitution, and all officers, whose offices may hereafter be created by law, shall be elected by the people, or appointed as the Legislature may direct.*"

The restriction as to the appointment of local officers by local authorities applies only to cities, towns and villages. It does not apply to a union free school district or a city school district. Under the express authority granted by the above section of the Constitution, the Legislature may in its discretion direct as to the method of appointing other officers not provided for in the Con-

stitution. There is no provision in the Constitution recognizing the existence of the office of a member of a board of education. It would, therefore, follow that the Legislature may legally direct as to the method of either electing or appointing members of boards of education.

It should further be noted that the school system of the State is a State system and not a local one. The Legislature may provide, as it has done, for State administration of such system. In every city, whether the boundaries of the city and school district are coterminous or not, the administration of the school system is separate and apart from the administration of the city government. The Legislature has in its wisdom seen fit to delegate the direct administrative control over schools in cities to local boards. Because of the State's interest in the maintenance of the public school system the Legislature has conferred upon State authorities comprehensive power of control over the local school organizations. It is not necessary to cite authorities sustaining the power of the State as to the school system. It seems clear that the Legislature has ample authority to confer upon the mayor of a city the power to appoint qualified electors of the city school district as members of the board of education of such district, notwithstanding the fact that such school district includes territory which is not within the boundaries of the city.

In making such appointments the mayor was acting in behalf of the State and was performing an official function in behalf of the public at large. He was not performing a function as mayor of the city of Port Jervis; he was performing a function in behalf of a State system of public education and was required to perform that function simply because the State deemed it desirable to select, as the permanent representative of the State and the public, the mayor of that city to perform such function. See *Maxmillian v. Mayor*, 62 N. Y. 164. The Legislature might have designated a Supreme Court justice of the judicial district in which Port Jervis is located instead of having named the mayor of the city of Port Jervis to fill a vacancy for the unexpired term on a board of education. A similar plan is followed in the State of Pennsylvania.

It must be held, therefore, that the mayor of the city of Port Jervis was authorized to appoint qualified electors of the district to fill vacancies in the board of education of the city school district of Port Jervis caused otherwise than by expiration of term, and that the persons so appointed by him to fill such vacancies are legal members of such board and must be permitted to participate in the acts and proceedings of the board of education of the district.

It is hereby ordered that James Wylie and James Gillender, having been duly appointed by the mayor of the city of Port Jervis as members of the board of education of union free school district No. 1, town of Deerpark, Orange county, constituting the city school district of the city of Port Jervis, be recognized and permitted to act as duly appointed members of such board of education until their successors are elected by the qualified electors of such district at the next annual election to be held therein, and that the said James Wylie and James Gillender be permitted to participate in all of the official acts and proceedings of such board; and that D. C. Starks, Emmet A. Brown, M. E. Eccleston, Harry Barley and Robert Hendrickson be and they hereby are directed to recognize the said James Wylie and James Gillender as the legally appointed members of such board, and that they act with said Wylie and Gillender in the exercise of the powers and performance of the duties imposed by law upon said board of education.

In the Matter of the Appeal of ALFRED M. ANDREWS Relative to the Indorsement of his Teacher's Certificate by the District Superintendent of the Third Supervisory District of the County of Herkimer

Case No. 401

(Decided December 3, 1917)

Where a district superintendent has refused to indorse the certificate of a teacher and there is a valid reason for such refusal the commissioner will not interfere with his decision.

Alfred M. Andrews, the appellant, is the holder of a teacher's training class certificate issued to him on August 1, 1904, by Walter E. Andrews,

school commissioner of the second school commissioner district of St. Lawrence county. This certificate was renewed by another superintendent of that county in 1912 for a period of ten years. Mr. Andrews taught under this certificate in the second school commissioner district of the county in question and after the renewal of his license taught in the sixth supervisory district of St. Lawrence county. During the school year of 1916-1917 he taught the public school at Salisbury Center in Herkimer county, being also the principal. He did not apply formally to the district superintendent of the district in which the Herkimer county school was located for an indorsement of his certificate, but taught during the year without such indorsement.

Subsequently he made a contract with the board of education to teach the same school for the school year beginning in September, 1917. He then formally requested District Superintendent Keller of that district to make such indorsement. That official, however, refused the certificate and the appeal herein was brought from such refusal. The Salisbury Center school is in the third supervisory district of Herkimer county. The certificate held by the appellant did not authorize him to teach in that school without the certificate of indorsement by the district superintendent of the district in which the school was located. The refusal of an indorsement is presumed to have been the result of a sufficient reason and with the view of protecting the interests of the schools in the district. The respondent superintendent in his answer in this appeal stated that he was dissatisfied with the conduct of the school by the appellant and did not consider him a competent teacher. The superintendent submitted also certain papers and statements as a basis for his belief. There having been a valid reason for refusing indorsement it will be presumed that the superintendent acted in good faith and hence there is no reason for reversing his action. Appeal dismissed.

S. H. Newberry, attorney for appellant.

Bronner & Ward, attorneys for respondent.

FINLEY, Commissioner.—The appellant, Alfred M. Andrews, holds a teacher's training class certificate issued to him on August 1, 1904, by Walter E. Andrews, school commissioner of the second school commissioner district of St. Lawrence county. Such certificate was renewed by W. R. Herrick, district superintendent of St. Lawrence county, in June, 1912, for a period of ten years, expiring July 31, 1922.

The appellant taught under this certificate in the second school commissioner district in St. Lawrence county, and subsequently,

after the renewal by District Superintendent Herrick, in the sixth supervisory district of such county, during a portion of the period covered by such certificate. During the school year of 1916-1917 he taught the public school at Salisbury Center in Herkimer county. This school is an elementary school, having three departments and employing three teachers. The appellant taught the advanced grades and was recognized as principal of the school during such year. It does not appear that the appellant made formal application to the district superintendent of the supervisory district in which such school is located for an indorsement of his teacher's training class certificate, and he taught during such year without such indorsement.

A contract has been made with him by the town board of education to teach the same school for the school year beginning in September, 1917. The appellant, being informed that some question was raised as to the sufficiency of his certificate owing to the lack of indorsement, made a formal request of District Superintendent Keller on August 10, 1917, for such indorsement. The district superintendent refused to indorse the certificate and this appeal is brought from such refusal of the district superintendent.

The law provides that the Commissioner of Education shall prescribe, subject to the approval by the Regents, regulations governing the examination and certification of teachers employed in all public schools of the State. Education Law, § 552. Rules have been adopted in accordance with the provisions of this section wherein provision is made for the issuance of a teacher's training class certificate after examinations held as prescribed therein. Section 246 of the Regents' rules provides that: "A training class certificate issued prior to August 1, 1906, shall be valid in any grade of any school for which it is issued or made valid by the district, village or city superintendent of schools."

This rule authorizes a district superintendent to render a training class certificate valid in his district by formal indorsement upon the certificate. Unless a training class certificate is so indorsed by a district superintendent, such certificate is not valid except in the district for which it is issued. The appellant's cer-

tificate was issued in the second school commissioner district of St. Lawrence county, and subsequently re-issued or renewed and made valid in the sixth supervisory district of that county. The certificate authorized the appellant to teach only in the schools of such districts in St. Lawrence county.

The school at Salisbury Center is in the third supervisory district of Herkimer county. The certificate held by the appellant did not authorize him to teach in such school unless such certificate was indorsed and thereby made valid by District Superintendent Keller.

Neither the statute nor the Regents' rules prescribe conditions under which a district superintendent shall indorse or refuse to indorse a certificate issued for and made valid in another supervisory district. The apparent purpose and intent of the rules are to confer upon a district superintendent discretionary control in the first instance of indorsement of teachers' training class certificates. The district superintendent is required by the statute to advise trustees relative to the employment of teachers. Education Law, § 395, subd. 4. It is his duty to examine and license teachers pursuant to the provisions of the law and rules of the Regents. Id. subd. 9. Under the rules and direction of the Commissioner of Education he is responsible, to a certain extent, for the character and competency of the teachers employed within his district. The proper performance of his duties renders it necessary for him to investigate as to the capacity and ability of the teachers in the schools in his supervisory district. If upon proper inquiry he finds that a teacher who has applied to him for an indorsement of a certificate issued and made valid in another supervisory district, is not a suitable teacher to be employed in a particular school, he may refuse, properly, to make valid the certificate in his district.

It will be presumed that a district superintendent in refusing his indorsement of a certificate has acted with sufficient reason and with a view of protecting the interests of the schools in his district. The Commissioner of Education will in a proper case direct indorsement by a district superintendent. Such action will not

be taken, however, unless it appears affirmatively that the district superintendent has been unreasonable in his refusal or has acted capriciously or from some improper motive.

The appellant herein taught in the supervisory district of the respondent Keller during the past school year without having had his certificate indorsed as required by the rules. It does not appear clearly why the respondent did not either indorse the appellant's certificate during the past school year or insist upon his leaving the school. All that can be gathered from the extended statement of the respondent filed as an answer in this appeal is that he was dissatisfied with the conduct of the school by the appellant and did not consider him a competent teacher. The respondent has submitted with his answer certain papers and statements showing some basis for his refusal to indorse the appellant's certificate. It is established by the evidence, to my satisfaction, that the district superintendent in such refusal acted in good faith and upon information which he believed to be true. It also appears satisfactorily that there was a valid reason for refusing the indorsement. It has not been established that the respondent district superintendent acted capriciously or unreasonably, and I do not therefore find any sufficient cause for reversing his action in thus refusing the indorsement.

The appeal is therefore dismissed.

In the Matter of the Appeal of MARGARET L. LYND against the
BOARD OF EDUCATION OF THE CITY OF NEW YORK

Case No. 402

(Decided December 3, 1917)

Determination by the board of examiners as to applications of unsuccessful candidates for licenses will not be disturbed except upon convincing proof of malice, bad faith or gross error upon the part of the examiners.

In 1898 a temporary license was issued by the city superintendent of schools to Margaret L. Lynd, as a teacher in the public elementary schools of the city of New York, and this license was made permanent in

[Vol. 14]

Education Department

1903. Six years later she made application for a license as principal of an elementary day school in that city, and in September, 1909, took the written examination for such license. She passed this and was then subjected to an oral test under the regulations prescribed by the superintendent. In 1910 three successive oral tests were given her. She failed to pass such tests to the satisfaction of the board of examiners and her application for a principal's license was thereupon refused. In 1916 she asked for a reconsideration of her application for a license as a principal and was notified by the city superintendent that the board of examiners regarded the matter as closed. Upon application in June, 1916, to the board of education she was advised by the secretary of the board that the power to issue licenses is conferred upon the city superintendent of schools.

The appeal herein is brought from the action of the board of education of the city in refusing to grant appellant a license as a principal of an elementary school. It has always been the contention of the Commissioner of Education in such cases that the determinations of the board of examiners will not be disturbed without convincing proof of malice, bad faith or gross error upon the part of the examiners. In the absence of such evidence the appeal must be dismissed.

Henry W. Bridges, attorney for appellant.

Charles McIntyre, Assistant Corporation Counsel, attorney for respondent.

FINLEY, Commissioner.—The petitioner is a teacher in the public elementary schools of the city of New York. A temporary license was issued to her by the city superintendent of schools in 1898, which license was made permanent in 1903. In 1909 she applied for a license as principal of an elementary day school in the city of New York, and in September of that year took the written examination held for such license. She passed this examination and was thereafter subjected to an oral test in accordance with the regulations prescribed by the superintendent. Successive oral tests or examinations were given her in May, June and September, 1910. The appellant failed to pass such tests to the satisfaction of the board of examiners and on account of such failure the principal's license applied for by the appellant was refused. In May, 1916, she requested the board of examiners to reconsider her application for a license as a principal of an elementary school, and she was notified by the city superintendent

of schools that the board of examiners regarded the matter as closed. The appellant subsequently, in June, 1916, applied to the board of education for relief, and she was informed by the secretary of the board that he had been directed to inform her that the power to issue licenses is conferred upon the city superintendent of schools, inferring thereby that the board of education had no jurisdiction to grant the appellant's application.

This appeal is brought from the action of the board of education of the city in refusing to grant her a license as a principal of an elementary school. The attorney for the respondent contends that under section 1089 of the Greater New York Charter it was the duty of the board of examiners to examine applicants for teachers' licenses and issue licenses to successful candidates, and that therefore the appellant's appeal does not lie against the board of education. In this contention he is doubtless correct.

Assuming that the appeal is properly brought and that the determination of the board of examiners may be reviewed therein, it must be noted that wherever appeals have been brought from determinations of the board of examiners in behalf of unsuccessful candidates for licenses, it has been held by the Commissioner of Education that the determinations of the board of examiners will not be disturbed unless there be convincing proof of malice, bad faith or gross error upon the part of the examiners. The determination of the board of examiners as to the qualifications, character and fitness of a candidate for a license is entitled to the benefit of every reasonable presumption in its favor and will not be set aside upon appeal except in a case where it is clearly shown by a preponderance of evidence that the candidate has been subjected to gross mistreatment. The Commissioner cannot substitute his judgment as to the general fitness of individual candidates for that of the examiners who are expressly authorized under the provisions of the Greater New York Charter to pass upon such qualifications. *Matter of Berry*, 9 State Dept. Rep. 575. There is no evidence in this case of malice, bad faith or gross error on the part of the examiners. In the absence of such evidence the appeal must be dismissed.

In the Matter of the Appeal of ARNOLD L. RICHARDSON from the Proceedings of the Board of Education of Unit No. 2, Town of Stamford, Delaware County, N. Y.

Case No. 404

(Decided December 3, 1917)

Resignation of teacher given conditionally to a school board of the district — effect of.

The board of education of union free school district No. 4, town of Stamford, entered into a contract on July 30, 1917, with one Arnold L. Richardson, the appellant herein, to teach in the Hobart High School as principal for forty weeks commencing September, 1917. On September 4, 1917, appellant entered upon his duties but subsequently the school board decided that he was under great mental strain and disqualified to perform his duties, and appellant was granted an absence of three days in which to consider the request of the board that he resign. Subsequently the appellant resigned as of September 21, 1917, if at that time his services were not satisfactory. The board having found that such services were not satisfactory were, under the terms of the teacher's resignation, justified in accepting such resignation, and their action in the matter is final. Under the circumstances of this case appeal dismissed.

George L. Bockes, attorney for appellant.

O'Connor & O'Connor, attorneys for respondents.

FINLEY, Commissioner.— On the 30th day of July, 1917, the appellant entered into a contract with the board of education of union free school district No. 4, town of Stamford, to teach in the Hobart high school and to act as principal of such school for a period of forty weeks, commencing September, 1917, at a weekly compensation of thirty dollars. Under the provisions of the Township School Law, district No. 4 became a part of unit No. 2 of the town of Stamford and all of its school affairs came under the jurisdiction of the board of education of such school unit which took office on August first.

On September fourth the appellant entered upon the discharge of his duties under such contract. The board of education of

unit No. 2 met on the evening of September eighth and adopted the following resolution:

"WHEREAS, It appears that Arnold L. Richardson, Principal of Hobart High School, is laboring under great mental strain, and that he is therefore disqualified from properly performing his duties as principal, and that the school is suffering because of lack of organization and general unsettled conditions, be it

"*Resolved*, That Messrs. King and Sheffield are hereby authorized to convey to Mr. Richardson the consent of this Board to a leave of absence of three days, at the same time requesting his resignation as principal of Hobart High School, to take effect before the hour for the opening of school, Monday, September 10, 1917, and to pay his salary in full to Saturday, September 15, 1917, inclusive, and further in case he refuses to present his resignation, to dismiss him from the principalship of the school, and provide the necessary instructors to continue without interruption the sessions of the school."

Pursuant to this resolution Mr. King, the chairman of the board of education; Mr. Sheffield, one of the members of the board; Mr. Ackley, the clerk of said board; Arthur T. Hamilton, district superintendent of schools having jurisdiction in said township, and the appellant, met by appointment at the office of Mr. King, in the village of Hobart, at about nine o'clock on Sunday morning, September ninth. Mr. King declared that he informed the appellant of the action of the board of education on the previous evening and that the board of education desired the appellant to present his resignation since his services were unsatisfactory, and offered to pay the appellant for his services to September fifteenth. He refused to tender his resignation at the time and after more discussion it was agreed that the appellant again meet with the members of the board at four o'clock in the afternoon, at which time he requested that he be permitted to continue as principal of the school for a period of two weeks and that if his services were not then satisfactory to the board, the board should have the right to accept his resignation, which was then reduced to writing and filed with the board in words as follows:

[Vol. 14]

Education Department

"Board of Education, Unit No. 2, Town of Stamford, Delaware Co., N. Y.:

"GENTLEMEN.—I hereby tender my resignation as principal of Hobart High School to take effect Sept. 21st, 1917, if at that time my services are not satisfactory.

"Respectfully,

"A. L. RICHARDSON.

"Hobart, N. Y., Sept. 9, 1917."

The board met on the evening of September twenty-first. It being the sentiment of the board, based upon observations of members of the board relative to the conduct of the school as well as reports from the faculty, pupils and parents, that the services of the appellant were not satisfactory, it was unanimously voted by the board to accept the resignation of the appellant and Mr. King, as chairman of the board, was directed to inform the appellant of such fact. It appears that he was so informed and was offered and accepted compensation for services rendered up to and including the date when such resignation was accepted.

The appellant contends that his resignation was obtained by misrepresentations made to him by members of the board, relative to his services being generally unsatisfactory, and that he was practically compelled to sign the same. The evidence produced is not sufficient to support the contention that the resignation was obtained from the appellant by means of misrepresentations or duress. Several hours elapsed between the time when the appellant was first informed that his services were not satisfactory to the board and the time when he again appeared before the committee of the board and prepared and signed his resignation. During this time he had opportunity to think the matter over and to consult with others if he desired to do so. His conclusion to resign was reached after mature deliberation, and appears to have resulted from the knowledge acquired that the board was desirous of dispensing with his services. The resignation was prepared by him and was to take effect at the time specified if his services were not satisfactory. The resignation was dependent for its

effect upon its acceptance by the board, and it must be construed as imposing upon the board the duty of determining whether such services were satisfactory. If the board found them unsatisfactory and accepted the resignation the contract was terminated, and the board was released from its obligations thereunder. The appellant having submitted the question of the satisfactory character of his services to his employer, he cannot now complain of its adverse finding.

The only question here determined is the effect of the resignation. It is not necessary or proper to determine whether or not there was sufficient cause for the determination that the services were unsatisfactory. The appellant in presenting his conditional resignation left the determination of this question with the board. If he had desired a decision as to the sufficiency of the cause of the desire of the board to dispense with his services, he should have insisted upon dismissal, in which case such dismissal could have been set aside on appeal, if found to be unjustifiable.

The appeal is dismissed.

In the Matter of the Appeal of MYRTLE CORBETT HEYWOOD from
the Action of the Board of Examiners of the City of New York
in Refusing to Issue to Her a Teacher's License

Case No. 403

(Decided December 6, 1917)

Refusal of board of examiners of New York city to grant appellant a teacher's license.

The appellant, Myrtle Corbett Heywood, has the necessary academic and professional qualifications and has been trained to teach commercial subjects. In April, 1911, she applied for an examination for a license as an assistant teacher of commercial branches in high schools. She was given three trials but failed to pass. *Held*, that there was no proof of discrimination against the appellant and that the question as to whether she passed the test successfully was for the board to determine, and it having done so the result may not be disturbed on an appeal to the Commissioner of Education.

[Vol. 14]

Education Department

Since this appeal was brought the appellant has made application to be licensed as an assistant teacher of accounting and business practice in the day high schools. This is the same as the former license of assistant teacher of commercial branches which the appellant had formerly sought. Her application, however, was denied on the ground of an "unsatisfactory record." She has also appealed from the refusal of the examiners to grant the license last mentioned. *Held*, that the judgment of the board in determining the fitness of the appellant is based upon full knowledge of her professional and personal qualifications, and being a reasonable exercise of discretionary power conferred upon the board, it may not be disturbed. Both appeals are dismissed.

Van Sinderen Lindsley, attorney for appellant.

Charles McIntyre, Assistant Corporation Counsel, attorney for respondents.

FINLEY, Commissioner.—The appellant appeals from the refusal of the board of examiners of the city of New York to issue her a license as assistant teacher of commercial branches in high schools. The by-laws of the board of education provide for the classification of teachers' licenses in day high schools, and licenses for assistant teachers in various special subjects are included in such classification. It is provided in the schedule of salaries that the annual salary to be paid an assistant teacher in high schools for the first year shall be \$900, increasing each year for two years at the rate of \$100, one year at the rate of \$200, and each year after the fourth year at the rate of \$150, until the maximum of \$2,650 is reached. Such increases in salaries are subject to certain conditions prescribed in the schedules relative to the fitness of the teacher and the merit of services rendered.

Section 1089 of the Greater New York Charter, as amended by Laws of 1901, chapter 718, which was in force when the action herein complained of was taken, provides that: "A board of examiners is hereby constituted whose duty it shall be to examine all applicants who are required to be licensed in and for the city of New York, and to issue to those who pass the required tests of character, scholarship and general fitness, such licenses as they are found entitled to receive. Such board of examiners shall con-

sist of the city superintendent of schools, together with four persons appointed by the board of education, upon the nomination of the city superintendent."

The statute makes it the duty of the board of education to designate the academical and professional qualifications of all members of the teaching staff and requires the board of examiners to "hold such examinations as the city superintendent shall prescribe," and to "prepare all necessary eligible lists." No person may be appointed as a teacher in the public schools of the city unless he is a holder of a license and his name appears upon the proper eligible list.

This statute confers upon the board of examiners discretionary control of the issuance of licenses to teachers who meet the required tests. The board's power in this respect is not limited, and no provision is made for a review of its determination as to the fitness of candidates for teachers' licenses by other school authorities of the city. The statute contemplates an ascertainment of such fitness by examinations and other tests, to be prescribed by the city superintendent, involving an investigation into the character, scholarship and general fitness of the candidates, and necessarily imposes upon the board the rating of such candidates in the examinations and tests which are applied. The broad and comprehensive appellate jurisdiction of the commissioner of education conferred by section 880 of the Education Law includes the power to review the determination of the board of examiners in refusing a license to a candidate, but it is obvious that he should not intervene unless it is evident from convincing proof that the board has arbitrarily, without cause or from an improper motive, deprived a candidate of his just rights.

With the discretionary power of the board of examiners as to the issuance of teachers' licenses in mind, and the purpose of the statute in conferring such power, it will be appropriate to consider the merits of the appellant's complaint. It appears that she has been trained to teach commercial subjects and possesses the necessary "academical and professional" qualifications required for service as a teacher of such subjects. She sought a

license as an assistant teacher of commercial branches in high schools, and applied for examination in April, 1911. Such examination is in three parts, written examination, oral examination and class test. She entered the written examination and failed to pass and was so notified in June, 1911, by the city superintendent. She again entered the examination in November, 1911, and succeeded in passing the written examination and failed in the oral examination, and was so notified by the city superintendent in February, 1912. She was again given the oral and class tests, which, as it appears from the answer of the respondent board, she failed to pass. The appellant has attempted to show by letters and reports of examinations that she successfully met these tests. She applied for oral and class tests in connection with her written examination under dates of September 25, 1912, and October 1, 1912, and such tests were denied her. She took a third examination for the license on October 14, 1912, and failed in the written examination. The board reconsidered its denial of her application for an oral and class-room test, and on December 31, 1912, she was notified by Examiner Byrnes that having passed an oral test for evening school and substitute licenses, it would be unnecessary for her to take the oral test. On January 2, 1913, she was given another class-room test which the board determined to be unsatisfactory. The board of examiners on a number of occasions considered her applications for a reopening of her case and each time refused to grant her a license, after making investigations and receiving reports as to her success as a substitute teacher.

The appellant continued her efforts to obtain a license as an assistant teacher of commercial branches in high schools, and again took a written examination on October 20, 1914, which she failed to pass. She sought subsequently to obtain a license based upon her alleged successful passing of the oral and class tests in May, 1912, but on each occasion the board refused to recognize her claim, and on September 18, 1916, she was informed by Acting Superintendent Straubenmiller that he had placed her case "once more before the board of examiners" and it had been decided that there was no merit in her claim.

The evidence submitted does not substantiate the claim that the appellant was discriminated against by the respondents in that they had refused "without just cause" to issue a license to her. The record of the appellant's tests is somewhat confused but enough appears to indicate that there was reasonable basis for the ratings made by the examiners upon the appellant's class-room test. The question as to whether she met successfully this test was for the board to determine, and having determined it adversely to her, upon its own interpretation of the reports as to such test, it may not be disturbed on appeal to the Commissioner of Education.

The appellant has, by inference, attempted to show that the board of examiners in determining her rating was actuated by a bad motive. She has alleged specifically that "One Joseph J. Klein, of 45 West 34th Street, New York City, an assistant teacher of commercial branches in day high schools of the city of New York, and who conducted coaching classes for said examinations, which your petitioner attended, demanded payment to him by your petitioner of \$1,000 as a condition for the issuance of said license, and appointment to teach, which sum or any sum your petitioner peremptorily refused to pay, whereupon said Klein stated that your petitioner would never receive said license, all of which is fully set forth in your petitioner's appeal to Thomas W. Churchill, president of the board of education, a copy of which is hereto annexed."

The appellant's purpose in setting forth this allegation is not disclosed fully in her petition. In her appeal to Mr. Churchill, to which she refers in her petition, she states that when she refused to pay to have her name "placed on the eligible list and for the appointment, a 'frame up' class test was arranged for between the coach (Klein), the board of examiners, and the first assistant at Washington Irving High School, to try to have some excuse for not issuing the license." The appellant thus attempts to connect the board of examiners with the alleged effort of a third person to obtain money from her for the license which she sought. No direct proof of any kind is presented tending to show that Klein had any influence with any member or officer of the board of examiners, or that the examiners were in any way inter-

ested in the alleged proposal to obtain money or influence to induce the granting of a license to the appellant. A careful examination of all the evidence adduced by the appellant shows that the inferential charge of misconduct against the respondent board of examiners is without any substantial basis.

It appears that Mr. Churchill submitted the appellant's appeal with all data relating to the charges made by her to the commissioner of accounts of the city of New York, who investigated the same and submitted a report to the mayor in which he states that the charges made were unsupported by evidence. Klein, who is alleged to have suggested that money be paid for inducing the examiners to grant the license, denies the appellant's allegation. The commissioner of accounts states that the district attorney rejected the evidence against Klein as insufficient to sustain criminal charges against him. Each of the members of the board of examiners denies that Klein or any one ever offered directly or indirectly any sum of money as an inducement for the granting of a license and swears that his action in voting to refuse a license to the appellant was based solely upon his conviction that she was not fit to receive it.

The appellant could have had no other purpose in alleging that Klein, who had coached her for her examination, had demanded money of her for use in obtaining a license, than to charge by inference that the board of examiners had refused the license which she sought because of her failure to pay. She must have known of the seriousness of such a charge. Unless she had definite proof indicating that the examiners were connected with the transaction, she was not justified in her assumption that her refusal to pay the amount demanded was the cause of her failure to obtain the license which she sought. Her conduct in attempting to base her charge of fraud and discrimination against the respondents on such unsubstantial and flimsy evidence was reprehensible and results in the natural conclusion that there was reasonable cause for withholding her license.

Since this appeal was brought the appellant has sought to obtain a license as an assistant teacher of accounting and business

practice in the day high schools, which is the same as the former license of assistant teacher of commercial branches, formerly sought by the appellant. She entered the examination for such license on April 9, 1917, and obtained a passing mark on her written test, but her application was denied on June 21, 1917, "on account of unsatisfactory record," as stated in the notice to her of that date. She requested and obtained a hearing before the board of examiners, and on July 3, 1917, she was notified that the board "declined to reconsider its previous action refusing, on account of record, your application as assistant teacher of accounting and business practice in high schools." She has also appealed from the refusal of the board of examiners to grant such license.

In her petition on this appeal she refers to her petition on the previous appeal. She has not retracted any of the imputations of fraud or misconduct contained in her former petition, and presumably requests a disposition of her subsequent appeal based upon all the allegations contained in both petitions. As has already been indicated, there was no sufficient basis for the inferential charge of fraud against the examiners, and her reprehensible conduct in asserting such groundless charge was one of the causes of the denial of her license. The respondents allege in their answer that "The board of examiners refused to grant to the petitioner the license involved herein because, as shown by the papers in appeal No. 1, which she makes part of the papers in this proceeding, it considered that her entire record and particularly her tendency to make unfounded accusations against public officials rendered her unfit to be presented with the license involved in this proceeding."

It does not appear that the respondent board of examiners has acted arbitrarily or without cause in withholding the appellant's license. The judgment of the board in determining the fitness of the appellant is based upon full knowledge of her professional and personal qualifications, and being a reasonable exercise of the discretionary power conferred upon the board, it may not be disturbed.

Both appeals are dismissed.

[Vol. 14]

Education Department

In the Matter of the Division of the TOWN OF VERONA, Oneida
County, into SCHOOL UNITS

Case No. 407

(Decided December 26, 1917)

Authority of a district superintendent of schools in regard to dividing a town into educational units.

In the town of Verona were two union free school districts, each maintaining an academic department and each within the provisions of the Township Law. One such union free school district maintained a full high school course, known as the Verona high school, and the other union free school district, located at Durhamville, maintained a one-year academic course. The board of education of the latter district brings this proceeding to have set aside the action of the district superintendent in dividing the town of Verona into the two school units. *Held*, that the intent of the law was that the district superintendent of schools, who is the local supervising officer, should have discretion in regard to dividing a town into units. There is a presumption of law that the determination of the district superintendent is reasonable and proper. The appellants have failed to overcome this presumption and hence upon all the facts it is held that the order of the district superintendent was properly made and that the division of the town of Verona into town school units should stand in accordance with such order. Appeal dismissed.

FINEGAN, Deputy Commissioner.— This appeal is brought from an order of the district superintendent of schools of the fourth supervisory district of Oneida county, dividing the town of Verona into two school units under the provisions of section 331, subdivision 2 of the Education Law, as added by Laws of 1917, chapter 328, known as the Township Law, which order was made and filed in the office of the town clerk of said town on or about the 5th day of June, 1917. Subdivision 2 of such section provides as follows: "Where there are two or more union free school districts each having a population of less than fifteen hundred, each maintaining an academic department which has been admitted to the university of the state of New York and the principal schoolhouse in each is situated wholly in the same town, the district superintendent shall

issue an order dividing the town into as many units as there are such union free school districts situated in the town and designating the several school districts of the town to be associated with such union free school districts to form such units."

It appears that there were two union free school districts in the town of Verona, each maintaining an academic department, and each within the provisions of the Township Law. One such union free school district maintained a full high school course, known as the Verona High School. The school of the other union free school district, located at Durhamville, maintained a one-year academic course. The board of education of the latter district complains of the order of the district superintendent in making the division of the town into units, it being asserted that common school district No. 12 should have been combined with the Durhamville union free school district in forming unit No. 2 of said town instead of being combined with the Verona union free school district in forming unit No. 1.

It was the intent of the law that the district superintendent of schools, who is the local supervising officer, should exercise his discretion in dividing a town into units. His knowledge of local conditions, school requirements and facilities enables him to make a division of the township such as would effect the greatest educational advantage to the entire community. A presumption exists in favor of the reasonableness and propriety of the determination of the district superintendent in the exercise of the discretionary power vested in him and there must be evidence sufficient to overcome this presumption to justify the setting aside or modification of such determination.

The appellants contend that common school district No. 12 is nearer and more accessible to the Durhamville Union School than to the Verona school and that, therefore, district No. 12 should have been made a part of unit No. 2. It is also asserted that under the order as it now stands unit No. 1 has an assessed valuation of \$1,094,925 whereas unit No. 2 has an assessed valuation of but \$706,106 and that if district No. 12 were taken from unit No. 1 and added to unit No. 2 the assessed valuation of the two units would be more equally divided.

The district superintendent has answered this appeal, from which it appears that the distance to be travelled from district No. 12 to the Verona High School is approximately three and seven-tenths miles, whereas the distance from such district to the Durhamville school by the main road is three and three-tenths miles. It, therefore, appears that the difference in distance is comparatively slight and is overcome by the fact that the Verona High School maintains a full academic course, whereas the Durhamville school has but a one-year academic course and that, therefore, the children attending the Verona High School are enabled to receive far greater educational advantages. It is also asserted by the district superintendent that although the distance is slightly greater to the Verona school, the character of the road and its freedom from obstruction during all portions of the year render the Verona school more easily and quickly accessible by conveyance from district No. 12.

With regard to the difference in assessed valuation as between the two school units it appears that in unit No. 1 the expense of maintenance is considerably greater for the reason that a full academic course is maintained and seventeen teachers are regularly employed as against the maintenance of a one-year's academic course and the employment of fourteen teachers in unit No. 2. The ratio of assessment to the cost of maintenance of the schools and the rate of tax does not differ greatly as between the two units.

It is further to be noted in connection with this appeal that the residents of district No. 12 are not the complainants. There is nothing to show that the people of this district are in any way dissatisfied with the order of the district superintendent in placing the district in unit No. 1. Upon all the facts which are set forth in the appeal and in the papers filed in connection therewith I am convinced that the order of the district superintendent was properly made and that the division of the town of Verona into town school units should stand in accordance with such order.

The appeal is dismissed.

In the Matter of the Appeal of LUCY B. ALLEN from a Resolution of the Board of Education of the City of New York Authorizing her Transfer from the New York Training School for Teachers to a High School

Case No. 405

(Decided December 28, 1917)

Transfer of a teacher from a training school to a position in a high school—
circumstances under which it is invalid.

The petitioner, Lucy B. Allen, was, on or about September 30, 1898, appointed a teacher in the New York Training School for Teachers in that city, the position to which she was appointed being that of assistant teacher of English in that school. In May, 1901, a temporary license as first assistant teacher of English was granted to her and three years later, on May 27, 1904, she was granted a permanent license. On September 13, 1916, she was informed by her principal that thereafter the direction of the work of her department would be under his immediate care. This appeal is brought from the action of the school principal in deposing appellant from the headship of the department of English in such training school, and also from the resolution adopted by the board of education on the recommendation of the board of superintendents assigning appellant temporarily to a high school pending the occurrence of a vacancy in one of the training schools, upon the ground that neither the board of education nor the board of superintendents had any authority to make this transfer.

Held, that the acts complained of by the petitioner occurred while the provisions of the Greater New York Charter relative to the licensing and transfer of teachers in that city were in effect; that although the various provisions of the charter involved in the present case were all repealed by what is known as the City School Law, chapter 786 of the Laws of 1917, which took effect June 8, 1917, the determination of the appeal, nevertheless, involves the application of various provisions of sections 1089, 1090, 1091 and 1093 of the charter; that under the sections above cited and the license issued to the appellant and under which she was teaching at the time of bringing the appeal, it was not necessary, in order that she be appointed to her position as first assistant teacher in a training school, that her name appear upon an eligible list, but a teacher could not be appointed as a first assistant teacher in the high schools of the city unless her name appeared upon the appropriate eligible list; that hence the resolution transferring the appellant to a high school was beyond the power of the respondent board of education

[Vol. 14]

Education Department

to enact. Also *held* that as to the authority of the principal of the training school to depose appellant from her position as the head of the English department it had not been shown that as first assistant teacher of English she was entitled to the headship of the English department, and that the appellant's request for reinstatement as head of such department may not be granted, but that the resolution of the board of education from which the appeal is taken must be *set aside*. Appeal sustained.

Edward W. Davidson, attorney for appellant.

Frank Harvey Field, of counsel.

Charles McIntyre, Assistant Corporation Counsel, attorney for respondents.

FINLEY, Commissioner.—The petitioner, Lucy B. Allen, was at the time of the bringing of this appeal a teacher in the New York Training School for Teachers in the city of New York. She was appointed to the position of assistant teacher of English in such school on or about September 30, 1898. In May, 1901, she obtained a temporary license as first assistant teacher of English in such school, and after a period of three years of continuous successful service she was granted a permanent license for such position on May 27, 1904. From that time down to September 13, 1916, she was in charge of the English department of such school and was commonly known as "Head of the English Department" therein. She performed the duties customarily incident to the position, such as planning and organizing the work of the department, supervising the carrying out of such plan, determining the textbooks to be used, representing the department at faculty meetings, helping to determine finally the fitness of students in English, conferring with the teachers of the department as to changes in its policy and recommending such changes to the principal.

She was notified on September 13, 1916, by the principal of the school that on and after that date the work of the English department would be under the immediate direction of the prin-

cipal and that all matters pertaining to courses of study, methods, text-books, etc., were to be determined by the principal after conference with individual teachers and with course groups. It appears that the petitioner complained of the action of the principal in deposing her from her position as head of the department and assuming the duties himself. She alleges, and there is evidence sustaining her contention, that when she was appointed to the position of first assistant in English in the training school the committee on special and high schools of the board of education, who nominated her for such position, reported that her appointment to the position of first assistant teacher in English would place her at the head of the department of English in such training school. The petitioner contests the act of the principal in removing her from the headship of the English department of the school, and prays that such action be declared null and void and that an order be granted directing her immediate reinstatement as first assistant in charge of such department. The petition therefore brings up for consideration the validity of the act of the principal in deposing the petitioner from her position.

The evidence submitted upon the appeal indicates quite clearly that both before and after the principal assumed control of the work of the English department of the school there was dissension and lack of harmony between the principal and the petitioner acting as the head of the department of English. The existing situation in the school being recognized by the board of superintendents, such board adopted a resolution on March 22, 1917, recommending to the committee on high schools and training schools of the board of education "that it take appropriate action to effect the assignment of Lucy B. Allen to duty elsewhere than in the New York Training School for Teachers, pending the occurrence of a vacancy in her own rank to which she may be formally transferred." The committee on high schools and training schools took under advisement the recommendation of the board of superintendents and reported to the board of education, under date of March 26, 1917, that it was of the opinion that the assignment of Miss Allen to duty elsewhere

should be made, and submitted for adoption a resolution in the following form:

"Resolved, That the acting city superintendent be, and he is hereby authorized to assign temporarily to a high school in the Borough of Manhattan, preferably the Washington Irving High School, Lucy B. Allen, a first assistant in the New York Training School for Teachers, pending the occurrence of a vacancy in one of the training schools to which she may be formally transferred, the assignment being without detriment as to rank or salary, and that any provisions of the by-laws inconsistent therewith be and they hereby are suspended for the purpose of this resolution."

Such resolution was adopted by the board of education on March 28, 1917, and the petitioner appeals from such resolution. She bases her appeal from this resolution upon the grounds, *first*, that neither the board of education nor the board of superintendents has the power to transfer or assign her to any school other than a training school for teachers in the boroughs of Manhattan and The Bronx; and *second*, that a re-assignment of the petitioner from the New York Training School for Teachers to a high school is in legal effect a removal from her position to a lower position and may not legally be done without her consent, except after a trial upon written charges as provided by section 1090 of the New York Charter.

The appeal therefore brings up for determination the validity of the resolution transferring the petitioner from her position in the New York Training School for Teachers to a high school in the borough of Manhattan, and the legality of the act of the principal in deposing her from the position which she occupied as head of the department of English in such training school.

At the time of the acts complained of by the petitioner, the provisions of the Greater New York Charter relative to the licensing, appointment, transfer and salaries of teachers in the public schools of the city of New York were in effect. The determination of the appeal involves the application of various provisions of sections 1089, 1090, 1091 and 1093 of the charter, all

of which were repealed by the so-called City School Law, chapter 786 of the Laws of 1917. This act took effect on June 8, 1917, and the appeal must therefore be determined under sections of the charter above referred to.

The license issued to the appellant, and under which she was teaching at the time of the bringing of the appeal, was termed a first assistant teacher's license in training schools and authorized her "to act as first assistant teacher to teach English in a training school." It was provided in section 1089 of the New York Charter that "Except as city superintendent or associate city superintendent or district superintendent, as director of a special branch, *as principal of or teacher in a training school*, or as principal of a high school, no person shall be appointed to any educational position whose name does not appear upon the proper eligible list."

It was not required, therefore, in order that the appellant be appointed to her position as first assistant teacher of English in the training school, that her name appear upon an eligible list. It is not claimed by the respondent board of education that her name was upon an eligible list for any position in the high schools of the city similar to that held by her in the training school. Under the provision of the statute above quoted, a teacher could not be appointed as a first assistant teacher in the high schools of the city unless she possessed a license qualifying her to teach in such position or unless her name appeared upon the appropriate eligible list.

The resolution directed her transfer "to a high school in the borough of Manhattan, preferably the Washington Irving High School." It was provided in section 1090 of the Charter that "Teachers and principals may be promoted or transferred from one school to any other school within the city by the board of superintendents, subject to the approval of the board of education; provided, however, that a teacher shall not be transferred from a school in one borough to a school in another borough without his or her consent."

This provision may not be construed or applied so as to author-

ize a transfer from a position which may be filled by appointment otherwise than from an eligible list to a position which may only be filled by an appointment from a duly established eligible list. Since appointments to positions in the high schools can only be made from eligible lists, it must be held that a teacher in a training school whose appointment was not dependent upon an eligible list may not be transferred to a position in a high school. To hold otherwise would permit of the evasion of a plain statutory requirement.

It is suggested that when the transfer was authorized there was no provision of law permitting the transfer of the appellant to a position similar to that held by her in any other training school, for the reason that there was no other training school in the borough of Manhattan, and that such being the case the statute prevented the transfer without the appellant's consent, which she naturally would refuse to give. The only way open, therefore, to relieve the situation, which the respondent alleges was acute because of controversies which had arisen between the appellant and the principal of the training school, was to authorize her transfer "without detriment as to rank or salary" to a high school in the borough of Manhattan.

Although the respondent board of education may have been justified in its conclusion that the situation existing in the training school demanded a reorganization of the teaching staff in the English department, such fact affords no basis for a violation or an evasion of the prescribed statutory method of appointing teachers to positions in the high schools of the city. It being determined that the attempted transfer was in violation of the provisions of the statute relative to appointments to positions in the high schools, it is unnecessary to consider the question as to whether such transfer constituted a removal of the appellant from her position because of the alleged fact that she was assigned to a position of lower rank and grade, which under the decision of the Court of Appeals in the case of *People ex rel. Callahan v. Board of Education*, 174 N. Y. 169, constituted a removal. It follows that the resolution authorizing the transfer of the appel-

lant from her position as first assistant teacher of English in the New York Training School for Teachers to a high school in the borough of Manhattan was beyond the power of the respondent board of education to enact, and it must therefore be set aside.

The question as to the authority of the principal of the training school to depose the appellant from her position as the head of the English department and to assume himself the control of such department, is more difficult to determine. I think that the facts adduced are sufficient to indicate that when the appellant was appointed as first assistant teacher of English in the training school it was intended that she should be the head of such department. The only basis for the appellant's claim to a position as head of the English department is found in the report of the committee of the board of education on special and high schools made April 3, 1901, in which Miss Allen was nominated as first assistant teacher of English, and it was stated therein that the position of first assistant "differs from the position of first assistant as referred to in the elementary schools and high schools" in that it places her at the head of the department of English in the Training School. The resolution adopted by the board was only for the purpose of appointing the appellant as first assistant teacher of English, and did not therein declare that she was designated as head of the department of English.

The appellant has failed to show any provision of the statute or the by-laws of the board which gave to her as a result of her appointment the privilege of continuing, during the time of her occupancy of her position as first assistant teacher of English, the headship of the department of English. It may have been recognized as the practice in the training school that the teacher designated as first assistant teacher should by virtue of her position be head of the department to which she was assigned. The appointment as first assistant teacher does not, however, give to the person appointed a legal right to continue in charge of the work of the department, nor does it prevent the exercise of control over the department by the principal of the school. The act of the principal in assuming control of the department has

[Vol. 14]

Education Department

been recognized and apparently ratified by the board of superintendents and the board of education. In so doing it would appear that the respondent board of education has exercised a discretion conferred upon it by statute. The appellant's request that she be reinstated in her position as head of the English department may not, therefore, be granted.

The resolution of the board of education from which the appeal is taken must be set aside.

The appeal is sustained.

It is hereby ordered that the resolution of the board of education of the city of New York adopted March 28, 1917, whereby the acting city superintendent was authorized to assign Lucy B. Allen, a first assistant teacher in the New York Training School for Teachers, to a high school in the borough of Manhattan, preferably the Washington Irving High School, be and the same hereby is set aside.

In the Matter of the Appeal of ARTHUR D. STETSON against the
BOARD OF EDUCATION of the City of New York

Case No. 406

(Decided December 28, 1917)

A teacher in the city of New York cannot legally be appointed to a principalship of an order higher than that for which he is licensed.

In 1902 the appellant, who had been a teacher in the city of Brooklyn for a number of years when that city became a borough of the city of New York under the new charter, was transferred by the board of education of the city of New York to the position of principal of public school No. 104, borough of Brooklyn, a school having less than twelve classes, and began his service therein that same year and has since remained in charge of the said school. When he was appointed to this school it contained ten classes. From time to time the number of classes has been increased and since 1912 the school has contained upward of eighteen

classes. The license under which appellant taught was a license as a "head of department or assistant to principal." The public schools at the time of his appointment to school No. 104 were all divided into five orders according to the number of classes in such schools. This particular school was in the fourth order, which included schools having six to eleven classes.

Under the by-laws of the board of education existing at the time of his appointment to this school it was required that fourth order schools should be placed under the care of a principal "who may be required, at the discretion of the board of superintendents, to teach a class. Such principal shall hold a head of department or a higher license." A school having eighteen or more classes should be placed under a principal holding a principal's license or who was, prior to January 1, 1912, officially recognized as a principal, and who should not be required to teach a class. The appellant asks herein for the sum of \$4,950, claimed by him to be due for his unpaid balance of salary because for several years he has been in control of a school of over eighteen classes but has failed to receive the regular compensation given to such principal. *Held*, that appellant had been holding a position which his license did not entitle him to fill and that he could not legally be paid the salary to secure which he brings this appeal. Under the circumstances, also *held* that the appellant should not be allowed to continue in his present position but should be assigned to a position for which he is legally qualified under the license which he holds. The board of education should provide for the appointment of a legally qualified principal to occupy the position now held by the appellant. Appeal dismissed.

John E. O'Brien, attorney for appellant.

Charles McIntyre, Assistant Corporation Counsel, attorney for respondent.

FINLEY, Commissioner.—The appellant, Arthur D. Stetson, a teacher in the public schools of the city of New York, complains of the action of the board of education of such city in refusing to pay him his salary as a principal of a public school having upwards of eighteen classes under salary schedule A as set forth in the by-laws of such board of education. He claims that he has been performing the duties of a principal of such a public school during the period specified in his petition, and that from January 1, 1912,

[Vol. 14]

Education Department

down to July 1, 1916, he was entitled under such schedule to a salary at the rate of \$3,500 per annum, and he asks that the respondent board of education and its officers, agents and subordinates be directed to pay to him the sum of \$4,950, the unpaid balance of salary due and owing to him because of the services performed in his position as principal of Public School No. 104, borough of Brooklyn, city of New York.

The appellant was graduated from the Potsdam Normal School on or about July 1, 1879, and received on October 22, 1889, a state teacher's license from the then State Superintendent of Public Instruction. In September, 1890, he was appointed a teacher in Public School No. 10 of the city of Brooklyn, and was a teacher in the public schools of such city when the Greater New York Charter took effect. On March 22, 1901, he was designated by the school board of the borough of Brooklyn as a head of department and assigned to Public School No. 23 in such borough. On October 22, 1902, he was transferred by the board of education of the city of New York to the position of principal of Public School No. 104, borough of Brooklyn, a school having less than twelve classes, and was installed therein as principal on November 17, 1902. He has remained in charge of said school from such date until the present time. At the time of his appointment as principal of such school it contained ten classes. In December, 1903, it became a school of twelve classes. The number of classes has been increased since that date from time to time so that on January 1, 1912, and at all times since that date the school has contained upward of eighteen classes.

At the time of the appellant's appointment as principal of Public School No. 104, borough of Brooklyn, he was in possession of a license known as a "head of department or assistant to principal" license: Under the by-laws of the board of education in existence when the appellant was appointed to the position of principal of Public School No. 104, it was provided that for purposes of organization and supervision elementary schools were divided into five orders according to the number of classes in such schools. Public School No. 104 having at the time of the appointment of

the appellant as principal ten classes, it was in the fourth order, which included schools having from six to eleven classes.

Such by-laws also provided at that time that "Schools of the fourth order shall be placed under the administration of a principal who may be required, at the discretion of the board of superintendents, to teach a class. Such principal shall hold a head of department or a higher license." See section 50, By-Laws of Board of Education, as amended March 26, 1902.

Subdivision 5 of section 50 of the by-laws was further amended on January 25, 1905, so as to provide that the teacher in charge of a school of the fourth order, one having from six to eleven classes, shall hold an assistant to principal or a higher license. The head of department license was equivalent to an assistant to principal license. It was also provided in the amended by-law that whenever by reason of increase in the number of classes in a school of the fourth order such school shall become a school of a higher order, the assignment of the teacher in charge of the school shall immediately terminate and such teacher shall be subject to transfer without diminution of rank or pay to some other school of the fourth order, or to any other school in which the services of an assistant to principal may be required.

Subdivision 4 of such section of the by-laws was further amended on December 27, 1911, to take effect January 1, 1912, so as to read as follows: "A school having eighteen or more classes, unless grouped with other schools as provided in subdivision 2 of this section, shall be placed under the administration of a principal (a person holding a principal's license or who was, prior to January 1, 1912, officially recognized as an elementary school principal), who shall not be required to teach a class."

Public School No. 104, to which the appellant was assigned, became a school of twelve classes in December, 1903, and therefore became a school of the third order. Under the by-law above referred to, then in force, the assignment of the appellant as principal of such school should thereupon have been terminated and he should have been transferred to some other position which his license would have entitled him to hold. As above indicated, the

[Vol. 14]

Education Department

number of classes of Public School No. 104 has been increased so that now it has eighteen classes, but is still retained in the classification of elementary schools of the third order.

Notwithstanding the increase in the number of classes and the provisions of the by-laws requiring the appellant's transfer, he was retained in his position as principal of the school. There is nothing in the record which indicates that he possessed a principal's license or any other certificate which under the by-laws of the board was sufficient to entitle him to hold legally the position as principal of an elementary school of the third order. It does not appear that his name was on an eligible list from which appointments as principals of elementary schools of the third order might be made. The board of education in amending subdivision 4 of section 50 as above indicated, doubtless intended to continue persons who had been "officially recognized" prior to January 1, 1912, as elementary school principals in their respective positions, although they may not have held principals' licenses.

The appellant on or about July 5, 1916, presented to the board of education a written notice of a claim in which he set forth that he was entitled to a salary in his position as principal of Public School No. 104, borough of Brooklyn, under Schedule A of the by-laws of the board of education, at the rate of \$3,500 per annum, and that there was due and owing to him as arrears of salary in his position as such principal accrued since January 1, 1912, the sum of \$4,950. The claim was referred to the committee on by-laws and legislation of the board of education and was considered by such committee at a meeting held July 10, 1916. The claim was denied and the secretary of the board of education so notified the attorney for the appellant. The appeal is brought from the refusal of the board to allow such claim.

It is not, apparently, contended by the appellant on this appeal that he is entitled to the salary of a principal of an elementary school for services rendered in such position prior to January 1, 1912. It appears from the allegations contained in his petition that on November 16, 1906, he filed a notice of a claim with the board of education for his salary as principal of a school of

upwards of twelve classes from the time when such school became a school of twelve classes in December, 1903, up to the date of the claim. This claim was also denied, and in May, 1910, he instituted in the Supreme Court in the county of New York an action against the board of education of the city to recover the sum of \$5,512.50, being the unpaid balance of the salary earned by him as principal of an elementary school of the third order. The appellant's suit was prosecuted and contested vigorously in the courts. Judgment was rendered in his favor on the trial in the Supreme Court, and such judgment was reversed in the Appellate Division. The Court of Appeals affirmed the decision of the Appellate Division. See *Stetson v. Board of Education*, 165 App. Div. 476; *affd.*, 218 N. Y. 301. The final determination was that the appellant was not entitled to the arrears of salary claimed by him because of services rendered as principal of Public School No. 104. The decision of the Court of Appeals, so far as the same is applicable to the question which the appellant now raises, must be held to control the determination of this appeal.

So far as appears from the records, the only distinction to be drawn between the claim prosecuted by the appellant in the courts and that which he now asserts, is that since January 1, 1912, he has occupied his position as principal under a by-law of the respondent board of education which attempted to give official recognition to him as a principal of an elementary school having eighteen or more classes. Under the by-laws existing at the time covered by his claim for arrears of salary prosecuted by him in the courts, he was not entitled to fill the position of principal of a school of the third order because he did not have a principal's license. The only question to be determined upon this appeal which has not already been disposed of by the Court of Appeals is as to whether or not the amendment of subdivision 4 of section 50 of the by-laws of the board legally warrants the payment to him of the full salary of a principal of an elementary school having eighteen or more classes.

It is provided in section 1089 of the New York Revised Charter that the board of education on the recommendation of the board

of superintendents shall designate the kinds or grades of licenses to teach which shall be used in the city of New York, together with the academic and professional qualifications required for each kind or grade of license. The section further provides: "The board of examiners shall hold such examinations as the city superintendent may prescribe, and shall prepare all necessary eligible lists, * * *. All licenses shall be issued in the name of the city superintendent of schools."

The section provides as to exemptions that "Teachers holding a state certificate issued by the state superintendent of public instruction since the year 1875, or holding a college graduate certificate issued by the same authority, * * * may be exempted, in whole or in part, from such examination at the discretion of the city superintendent."

The section then requires the city superintendent to prepare lists and enter thereon the names of those to whom licenses have been granted, "including those exempted from examinations and those duly licensed in the several boroughs prior to the date on which this act takes effect." A separate list is required to be made for each grade or kind of license for which the board of education shall by its by-laws make provision. The section then provides that "Except as city superintendent or associate city superintendent or district superintendent, as director of a special branch, as principal of or teacher in a training school or as principal of a high school, no person shall be appointed to any educational position whose name does not appear upon the proper eligible list. No person shall teach in any public school in the city who has not such license, except as herein otherwise provided, nor shall any unlicensed teacher have any claim for salary."

The Court of Appeals in its determination of the case brought by the appellant in the courts carefully considered this statutory enactment and applied it to the appellant's case. The court in its opinion states (218 N. Y. 310): "The plaintiff became a principal of a school of the third order after the provisions of the charter became effective. The legislature had then and by those provisions prescribed that the plaintiff could not be appointed a

principal of an elementary school of an order higher than the fourth grade, unless he had (a) passed the examination entitling him to a principal's license, and thus secured the right to the license and a place on the eligible list, or (b) been exempted from such examination. The plaintiff had neither passed nor been exempted from the examination."

The court thereupon concludes that while the plaintiff may have lawfully become a principal of a school of the fourth order because of his holding a license entitling him to occupy such position, he was not on this account entitled to occupy the position as principal of a school of the third order, because at the time when the school of which he was principal became a school of the third order he did not possess a license entitling him to hold that position. The court states: "His formal appointment to a school of the third order accepted by him would have been illegal and reprehensible. The Board of Education and himself would have violated the spirit and language of the statute and manifested an indifference to its purposes and their duties and responsibilities. His retention as principal of School 104, after it was transformed into a school of the third order, was equally a violation of the spirit and language of the statute."

The Court of Appeals thus declared unequivocally that the retention of the appellant in his position as a member of an elementary school of the third order was in violation of the statute, and that he was not legally entitled to hold that position or to receive the salary for services rendered therein.

The amendment of subdivision 4 of section 50 of the by-laws of the board of education cannot be construed as legalizing the retention of the appellant in his position as principal of such school and as entitling him to the salary of such principal. Notwithstanding the amendment, the fact still remains that there was a non-compliance with a plain statutory provision requiring that a person appointed as principal shall obtain upon examination a license authorizing him to hold the position, and that an appointment to such position must be made from an eligible list containing the names of the holders of such licenses. If the purpose

of the amended by-law was to legalize the retention of the appellant in his position and give to him the salary attached thereto, it must be held to be to this extent invalid because in conflict with the statutory requirement of examination and appointment from eligible lists. The board of education may not by rule limit or modify the application and effect of such statutory requirement.

The conclusion therefore must be that if the appellant was not entitled to hold the position which he did as principal of Public School No. 104 and to receive the salary paid to such principal according to the schedule of salaries prescribed in the by-laws of the board of education, from the time when such school became a school of the third order, he is not now entitled to hold such position and to receive the salary attached thereto as a result of the amended by-law which took effect on January 1, 1912. The determination of the Court of Appeals as to the legality of his retention in such position prior to the time when the suit was brought must control the determination of this case.

The appellant raises the question upon this appeal that the possession by him of a state teacher's license gives him a legal right to hold the position as principal of Public School No. 104. The Court of Appeals also considered this phase of the controversy, and in so doing quotes with approval the language of the Commissioner of Education in the case of *Matter of Opperman* against the Board of Education of the City of New York. In the case referred to it was contended that the holder of a State teacher's certificate was, notwithstanding the provisions of section 1089 of the Revised New York Charter, entitled to hold any position in the public schools in the city of New York. It was held in that case that it was competent for the board of education to impose upon the holder of a State teacher's certificate "additional academic and professional qualifications as a preliminary requirement for appointment as principal of an elementary school in the city of New York." The charter authorizes the city superintendent of schools to exempt in his discretion the holder of a State teacher's certificate from examinations for teachers' licenses. Unless the holder of such a certificate has been exempted, such certificate gives him no special right to appointment without further examination to any position in the public schools of the city.

The appellant has repeatedly taken the examination for a principal's license and each time has failed in passing the same. He has never been exempted from such examination and his name has never appeared upon an eligible list from which an appointment as principal of an elementary school of the third order may be made. It has been judicially determined that his retention in his position as principal of a school of the third order was in violation of a statutory requirement, and since such determination the board of education has taken no valid action legalizing his retention in such position. Since the appellant's retention in his position was illegal because in violation of the statute, and in consequence thereof the attempted ratification of such retention was invalid, the appellant has no legal claim against the respondent board of education for arrears of salary and his appeal must therefore be dismissed.

The practice of permitting teachers to remain in positions which the licenses held by them do not entitle them to hold, being in violation of statute, is not justifiable and must be condemned. Both the statute and proper educational policy recognize the necessity of certain prescribed qualifications for persons employed as teachers in the public schools of the city of New York, and of applying such qualifications uniformly to teachers engaged in the performance of similar duties. There can be no justification for a departure from this rule unless unavoidable because of a temporary emergency. Teachers holding positions which their licenses do not entitle them to fill may not be paid the salaries attached to such positions. They should not be required or requested to fill positions when they are not entitled to the compensation to be paid therefor.

The appellant should not, therefore, be continued in the position which he now occupies, but should be assigned to a position for which he is legally qualified under the license which he holds. The respondent board of education should provide for the appointment of a legally qualified principal to occupy the position now held by the appellant.

The appeal is dismissed.

[Vol. 14]

Education Department

It is hereby ordered that the board of education of the city of New York be and they hereby are directed to transfer or assign Arthur D. Stetson to a position on the teaching staff of such city which he is qualified legally to hold under his teacher's license, and that the position of principal of Public School No. 104, borough of Brooklyn, city of New York, be filled by a teacher holding a principal's license as required by the by-laws of such board of education.

In the Matter of the Appeals of Certain Trustees from an Order Made by CLAUDE D. CARTER, District Superintendent of Schools of the Third Supervisory District of Cortland County, Dated April 27, 1917, Dissolving School Districts Nos. 3, 5, 6 and 8, Town of Freetown in Said County and Annexing the Territory Thereof to School District No. 1 of Such Town

Case No. 409

(Decided January 11, 1918)

Authority of town boards of education and the electors of towns interested in the matter of dissolving districts and annexing territory thereof.

On the 27th of April, 1917, Claude D. Carter, district superintendent of schools of the third supervisory district of Cortland county, executed four separate orders dissolving respectively districts Nos. 3, 5, 6 and 8 of the town of Freetown in such county and annexing their territory to school district No. 1 of such town. The appeals are from the said orders. The four appeals, while distinct, are based upon the same situation and have been disposed of by one decision. The district superintendent in making the orders in question had in mind the construction of a central school at the hamlet known as Freetown Corners for the accommodation of the children of the districts. The erection and maintenance of such a school would provide obviously more valuable school opportunities than are now afforded by the small and inadequate schools maintained in the several districts. Under section 330 of the Township School Law, which is chapter 328 of the Laws of 1917, no order consolidating two or more school districts shall be effective until such order is approved by a majority vote of the town board of education of the town or towns in which such districts are located, and thereafter approved by a majority vote of the qualified electors of each district present and voting at a

meeting of the districts consolidated by said order. The orders herein were not put through this course and should therefore be set aside. Appeals sustained.

William D. Tuttle, attorney for appellants.

Claude D. Carter, respondent in person.

FINLEY, Commissioner.— Claude D. Carter, district superintendent of schools of the third supervisory district of Cortland county, executed four separate and distinct orders dated April 27, 1917, dissolving districts Nos. 3, 5, 6, and 8 of the town of Freetown in such county, and annexing the territory thereof to school district No. 1 of such town. Richard Phalen, former trustee of school district No. 3, Irving D. McCumber, former trustee of district No. 5, A. A. Griffin, former trustee of district No. 6, and A. A. Wavle, a resident and taxpayer in district No. 8, have brought four separate appeals from such orders, in which they ask that they be set aside and declared null and void. All of these appeals bring up for consideration substantially the same questions and therefore they should be disposed of by one decision.

It appears that prior to the execution of the orders the district superintendent called a special school meeting of the qualified electors of the district for the purpose of considering the proposition of consolidating school districts Nos. 1, 3, 5, 6 and 8. The meeting was held on April 26, 1917, and was attended by a considerable portion of the qualified electors of the districts. The meeting adjourned without voting upon the question. The appellants contend that a majority of the electors present were opposed to the consolidation. Because of the failure to vote upon the proposition there is no way to definitely ascertain the will of the electors of the districts as to the proposed consolidation. It may be assumed, however, that since there was a failure to obtain an expression of the will of the electors present at the meeting a majority was opposed to such consolidation.

The district superintendent had in mind the construction of a central school at the hamlet known as Freetown Corners for the

[Vol. 14]

Education Department

accommodation of the children of all the districts. It appears from the answer of the district superintendent and from records of this Department and inspections made by officers of the Department that many if not all of the school buildings in the districts must be either rebuilt or extensively repaired within a short period of time to provide suitable and adequate school facilities for the children of the districts. It is probable also that a new school building centrally located as proposed would be reasonably accessible to the children of all the districts and that they could attend such school without great hardship. If such a school were erected and maintained it would provide obviously more valuable school opportunities than are now afforded by the small and inadequate schools now maintained in the districts.

The Township School Law, being chapter 328 of the Laws of 1917, went into effect May 2, 1917, only a few days subsequent to the execution of the orders of consolidation. Under section 330 of such law, existing school districts were continued and it was provided that "No order consolidating two or more school districts shall be effective until such order is approved by a majority vote of the town board of education of the town or towns in which such districts are located, and thereafter approved by a majority vote of the qualified electors of each district present and voting at a meeting of the districts consolidated by said order."

The town board of education, having control over all of the schools of the town, took office August 1, 1917. Such board has the power to designate a new site for a school-house and to construct and equip new school buildings for the proper accommodation of the school children of the town. Education Law, §§ 343, 344, as added by Laws of 1917, chap. 328. If the amount to be expended for the proposed improvement exceeds in the aggregate one-half of one per centum of the assessed valuation of the town, or is in excess of \$5,000, the law requires the submission of a proposition for such purpose to the vote of a school meeting of the town.

It follows that under the Township School Law, which now controls the schools in the dissolved districts, the entire question of abandoning the existing schools in such districts and of erect-

ing and maintaining a central school in place thereof must be determined by the town board of the town of Freetown and by the qualified electors of the town voting at a school meeting duly called for the purpose.

While the district superintendent was authorized prior to the taking effect of the Township School Law to dissolve the districts in question and annex the territory thereof to school district No. 1 of such town, and the conditions upon which the orders were based may have been such as to justify their execution, it seems reasonable to permit the town board of education and the qualified electors of the districts affected to determine in the manner provided by the Township School Law what districts are to be consolidated, where the proposed central school is to be located, and the amount that shall be expended for the erection and equipment of such school. The orders appealed from should therefore be set aside.

The appeals are sustained.

It is hereby ordered that the orders of Claude D. Carter, district superintendent of schools of the third supervisory district of Cortland county, executed April 27, 1917, dissolving school districts Nos. 3, 5, 6, and 8, town of Freetown, Cortland county, and annexing the territory thereof to school district No. 1 of such town, be and the same hereby are set aside and declared null and void.

In the Matter of the Appeal of CORA A. CARPENTER from the Determination of the State Teachers' Retirement Fund Board upon Her Application for Retirement

Case No. 411

(Decided January 11, 1918)

A school board has a certain amount of discretion in granting or withholding retirement as a privilege to a teacher.

The State Teachers' Retirement Fund for public school teachers was established by chapter 449 of the Laws of 1911 and went into effect August 1, 1911. The appellant herein, Cora A. Carpenter, had retired

as a school teacher in the city of New York three or four years before the enactment of the law in question. After the enactment the appellant returned to the schools as a teacher and attempted to resume her work. After remaining nine weeks she again relinquished her position. In December, 1912, she made application for retirement but such application was rejected and it is upon the refusal of the board to grant her application that this appeal is brought.

The general policy adopted by the board in regard to retirement was to require evidence of permanent employment for the fixed period of at least one year to render an applicant eligible for retirement. *Held*, that it was within the power of the board to adopt such a policy and the statute confers no positive right to retirement upon mere proof of service for the required period of time. It is a privilege to be granted or withheld by the board upon a proper showing. Within a reasonable discretion the applicant has no remedy from the action of the board. The action of the board in denying appellant's request for retirement confirmed. Appeal dismissed.

William D. Tuttle, attorney for appellant.

FINLEY, Commissioner.—The appellant, Cora A. Carpenter, who has been a teacher in the public schools of the State of New York, appeals from the action of the State Teachers' Retirement Fund Board in denying her application for retirement and the payment of an annuity under the provisions of section 1109 of article 43-b of the Education Law, as inserted by chapter 449 of the Laws of 1911 and amended by chapter 44 of the Laws of 1914.

The State teachers' retirement fund for public school teachers was established by chapter 449 of the Laws of 1911, above referred to, which went into effect August 1, 1911. At the time this act took effect and for a considerable period prior thereto, the appellant was not employed as a teacher in the public schools of the state. The records of the board show that the appellant ceased teaching some four years or more prior to the taking effect of such act. The counsel for the appellant admits that she was compelled to retire from her position as a teacher in 1907 because of ill health. In November, 1911, the appellant accepted a position as teacher and attempted to resume services as such. She was compelled after a period of about nine weeks to relinquish her position. Subsequently, in December, 1912, she applied to the board for

retirement. In her application she stated that she was fifty-two years of age at the time and had completed twenty-four and one-half years' service as a teacher. The application was rejected on April 26, 1913. At the request of the appellant, the board reviewed such rejection on July 24, 1913, and again on October 25, 1913. The attorney for the appellant renewed the request for review on April 27, 1917, and upon the refusal of the board to grant the application this appeal is brought.

The board in passing upon the final request for review stated in writing to the attorney for the appellant, as a reason for denying the application, as follows: "Miss Carpenter ceased teaching four or more years prior to the time the law took effect, August 1, 1911, and has taught but nine weeks since. When the law first became effective and upon the advice of the State Education Department, the board adopted the following policy in its administration of the law: Teachers who had ceased service prior to the time the law took effect and returned to the work after the law became effective should render such service for at least one year in order to be eligible for consideration relative to retirement."

The only question for determination upon this appeal is whether the board was legally authorized to deny the application for retirement upon the grounds stated, and whether or not such denial was a fair exercise of the discretionary powers of the board.

The privileges conferred by the statute are extended to teachers employed in the public schools for the time specified therein. If a teacher had retired prior to the taking effect of the law and was not subsequently employed, she is not entitled to retirement and an annuity under its provisions. The statute was enacted for the benefit of teachers actually employed in the public schools at the time of its enactment, or who being temporarily out of the service prior to that time were subsequently employed in good faith, with the purpose of continuing permanently in the service. The Teachers' Retirement Fund Board at the outset found difficulty in administering the law in cases where teachers had retired permanently prior to its enactment, who would have been entitled to the privileges thereunder if they had continued in their employ-

ment. Cases were frequent where applicants who had not been employed at the time of its enactment sought to obtain privileges thereunder by obtaining merely nominal or temporary employment under teachers' contracts for the obvious purpose of coming within the provisions of the law. The board adopted the policy of requiring evidence of permanent employment for the fixed period of at least one year to render an applicant eligible for retirement.

There is no statutory limitation upon the power of the board to adopt such a policy. Subdivision 3 of section 1109 of the law provides for the written request for retirement by a teacher and imposes upon the board the duty to pass upon such requests. It provides that "The board shall pass upon all requests for retirement, and shall determine whether such requests shall be granted." This language confers upon the board discretionary power to consider the evidence submitted and the conditions under which the request is made, and in its discretion determine whether retirement is warranted. The statute confers no positive right to retirement upon mere proof of service for the required period of time. Retirement is a privilege to be granted or withheld by the board upon a proper showing. If the board has exercised reasonably and fairly the discretionary power conferred upon it, the applicant has no remedy.

The evidence in the case as presented to the board, and which is before me, shows that the appellant after teaching twenty-four and one-half years retired from the service because of physical incapacity rendering it impossible for her to perform her duties as teacher. The physical condition of the appellant was such as to incapacitate her permanently as a teacher. She was out of the service because of such retirement for more than four years. It may be assumed fairly, without injustice to her, that she would not have sought re-employment if the Retirement Fund Law had not been passed. It is conceded that after continuing in her position for a period of not more than nine weeks she was compelled to relinquish it for the same reason which caused her original retirement.

These facts justify the action taken by the board. The loss to

the appellant because of the denial of her request for retirement may be great, and she is doubtless entitled to sympathy, but it is clear that the board could not have granted her request without recognizing and confirming the practice upon the part of any teacher who had retired permanently from the service prior to the enactment of the law of obtaining only nominal and temporary employment for the sole purpose of obtaining the payment of an annuity from the retirement fund. Such a practice would have resulted in serious depletion of the fund and defeated its fundamental object.

The action of the board in denying the appellant's request for retirement must be confirmed and the appeal dismissed.

In the Matter of the Appeal of FRANCES BOWEN from a Determination of the State Teachers' Retirement Fund Board Rejecting Her Application for Retirement

Case No. 412

(Decided January 11, 1918)

Where physical disability is the basis for asking for retirement such disability must be clearly shown.

On April 13, 1916, Frances Bowen, the appellant herein, a qualified teacher in the public schools of the State, applied to the State Teachers' Retirement Fund Board for retirement. The board denied her application and this appeal is brought from such denial. The appellant at the time of making her application was forty-one years of age and had been a teacher for some seventeen years. The appeal papers were not filed with the Department until February 5, 1917. As to her condition at the time of such application appellant referred to two physicians, one of whom, however, failed to submit any evidence as to her physical condition, and the other stated that in his opinion she had chronic Bright's disease, but he "was not sure about that," and further stated that he was quite sure that appellant would never be able to return to teaching. *Held*, that under these circumstances the board were within their discretion in denying the application and that their action should not be disturbed. Appeal dismissed.

John A. Bowen, attorney for appellant.

FINLEY, Commissioner.— The appellant, Frances Bowen, was a qualified teacher in the public schools of the State. She applied to the State Teachers' Retirement Fund Board for retirement on April 13, 1916. The board at its meeting on July 28, 1916, denied the application. The appeal is brought from such denial.

At the time of making her application she was forty-one years of age and had been in service as a teacher for a period of seventeen years. The papers on appeal were not filed in this office until February 5, 1917. The appellant does not show by affidavit of physicians that she was at the time of the application incapacitated for further service as a teacher. The board before passing upon the application communicated with the physicians referred to by the appellant. One of such physicians did not submit any evidence of her physical condition. Another one stated that in his opinion the appellant was afflicted with chronic Bright's disease but that he "was not sure about that," and further stated that he was "quite sure" that the appellant would never be able to return to teaching.

The board considered the evidence of physical disability as not sufficient to warrant retirement, and in so doing they appear to have exercised a fair and reasonable discretion. Their determination as to the physical condition of the appellant and as to the granting of her request for retirement should not be disturbed.

The appeal is dismissed.

ATTORNEY-GENERAL

In the Matter of Construing SECTION 205 OF ARTICLE IX OF THE TAX LAW Relative to Bonds Held by a Public Service Water Corporation upon Which Corporation Taxes Have Been Paid but upon Which no Investment Taxes Have Been Paid, as Provided by Article XV of Such Statute; also as to Whether Such Bonds Are Exempt from the Penalty Imposed by Section 336 of Article XV of the Tax Law

(Opinion dated November 12, 1917)

Nature and extent of taxes paid under Corporation Tax Act and of the exemption from the penalty imposed by section 336 of article XV.

Article IX of the Tax Law provides that every stock corporation is required to pay a franchise tax upon its capital stock for the privilege of doing business in this State, and reports are required to be made by such corporations to the State Board of Tax Commissioners. A tax is imposed upon such corporations upon the amounts thus reported, and the property reported includes all property which the corporation holds invested in the stocks or bonds of other corporations, and are taken into consideration in the levying of the taxes. *Held*, that the taxes imposed under the Corporation Tax Act are all State taxes and are all paid into the State treasury, and no more reason exists for subjecting the bonds held by a public service corporation as part of its assets, and upon which the taxes have been paid under article IX for State purposes, than there is for subjecting the owner of a bond upon which the investment tax has been paid to the penalty provided in section 336 of article XV of the Tax Law, and that such bonds upon which corporation taxes have been paid remain exempt, as provided by section 205 of article IX from further taxation for State purposes, and are not subject to local assessment without deduction for debts as provided by section 336 of article XV of the Tax Law if the owner fails to pay the additional tax as therein provided.

Hon. Eugene M. Travis, the State Comptroller, submitted an inquiry, together with a request for an opinion thereon, as follows:

"Is a corporation, which has paid its corporation taxes as provided by article IX of the Tax Law, but has not paid any taxes under article XV (Laws of 1917, chap. 700), subject to assess-

[Vol. 14]

Attorney-General

ment upon the fair market value of bonds held by it without deduction for just debts as specified by section 336 of article XV?"

LEWIS, Attorney-General.—It is provided by article IX of the Tax Law that every stock corporation is required to pay a franchise tax upon its capital stock for the privilege of doing business in this State, and provision is made in such article for reports to be made by such corporations which are sent to the State Board of Tax Commissioners, and upon such reports a tax is imposed upon such corporation. The reports include all property held by the corporation invested in the stocks or bonds of another corporation, and are taken into consideration in the levying of the taxes.

In *People ex rel. Tetragon Co. v. Sohmer*, 162 App. Div. at page 437, the court said: "The value of the capital stock is the value of the property of the corporation without regard to the amount of the capital stock. The term 'capital stock' means not share stock, but the property of the corporation. Capital stock and capital are practically the equivalent of each other when considered as a basis for a franchise tax."

The bonds of a public service water corporation held by a stock corporation are therefore treated as assets and property of such corporation and are taxed under article IX. The taxes so paid are paid into the State treasury for State purposes and when once paid, the personal property of the corporation is exempted from assessment and taxation for all State purposes, by the provisions of section 205 of such act.

That portion of section 205 of article IX which applies to the question under consideration, reads as follows:

"§ 205. Exemption from other state taxes. The personal property of every corporation, company, association or partnership, taxable under this article, other than for an organization tax, shall be exempt from assessment and taxation upon its personal property for state purposes, if all taxes due and payable under this article have been paid thereby."

Assuming that the investments owned by a corporation, consisting of the bonds or stock of some other corporation, have been included in and made a part of its assets for the purpose of laying the corporation taxes as provided by article IX, such bonds become and remain exempt for all State purposes so long as they are held by such corporation and enter into its annual reports rendered by the corporation for the purpose of computing the taxes from year to year. The question arises whether if such a corporation fails to pay the investment tax on such bonds under article XV, it is subject to assessment upon the fair market value of such bonds without deduction for just debts as specified by section 336 of such last mentioned article.

The provisions of section 336 of article XV are in the nature of a penalty, imposed upon the owner of an investment upon which the taxes provided for in such article are not paid, but I do not think it was intended to cover bonds or other investments held by a corporation upon which it has paid a tax as provided by another act.

Much depends upon what the Legislature intended by the words in section 336 of article XV, which reads as follows:

"§ 336. No deduction of debts against taxable investment. The owner of any investment, on which the tax provided for in this article has not been paid, shall be assessed upon such investment in the taxing district in which he resides, upon the fair market value of such investment and no deduction for the just debts owing by him shall be allowed against the assessed value of such investment, as provided in section six of this chapter, or elsewhere in this chapter or in any other law of this state.
* * *

The taxes imposed by article XV are purely "State taxes," and if the owner of bonds who has paid a tax upon the same as provided by article IX of the Tax Law is required to pay another State tax in order to avoid the penalty of local assessment without deduction for debts, it would amount to double taxation upon that class of property, which I do not think the Legislature intended to impose. It is apparent that the Legislature intended

[Vol. 14]

Attorney-General

to reach a large class of intangible personal property which was escaping taxation prior to the passage of the first "secured debts" taxation act. I do not think it intended to require any class of bondholders to pay an additional or double State tax in order to secure exemption from the penalty above referred to.

Public service corporation bonds are held in large quantities by individuals and copartnerships, which would not be subject to a corporation tax, and would be clearly taxable under article XV. It is evident that bonds so held were some of the property which the Legislature intended to reach by the enactment of article XV.

The taxes imposed under the Corporation Tax Act are all State taxes and are all paid into the State treasury, and no more reason exists for subjecting the bonds held by a public service corporation as part of its assets, and upon which the taxes have been paid under article IX for State purposes, than there is for subjecting the owner of a bond upon which an investment tax has been paid to the penalty provided in section 336. All indirect taxes inure to the benefit of the municipalities whether any part goes directly into the local treasuries or not. The needs of the government have to be supplied whether the taxes are raised by direct or indirect methods and all taxes raised indirectly relieve the respective taxpayers of the various municipalities of the State of just so much direct taxation. We all know that in several years in the immediate past all direct State taxes have been eliminated solely by raising the necessary State funds by indirect taxation, and thus local taxation for State purposes has been eliminated.

I am not unmindful of the decisions by our courts that exemptions from taxation are not favored, and that they will not be allowed except where the legislative intent is clear and definite, but it must be borne in mind that the Legislature did say in clear and explicit language, in section 205 of article IX, that the personal property of the corporations therein named should remain exempt from taxation for all State purposes, and can it be inferred that it intended to force such corporations to pay an additional State tax or be penalized for such failure? I think not, and in the absence of any direct provision indicating that it was the

legislative intent to subject a corporate holder of public service corporation bonds upon which the taxes had been paid, as provided by article IX, to the terms and provisions of the Investment Tax Law, it is my opinion that such bonds upon which corporation taxes have been paid remain exempt, as provided by section 205 of article IX, from further taxation for State purposes, and are not subject to local assessment without deduction for debts as provided by section 336 of article XV, if the owners fail to pay the additional tax as provided therein.

IN THE MATTER OF CONSTRUING THE TAX LAW, SECTION 4, SUBDIVISION 5, AS TO WHETHER REAL PROPERTY PURCHASED WITH THE PROCEEDS ARISING FROM THE SALE OF ANOTHER PIECE OF PROPERTY OWNED BY A PENSIONER, UPON WHICH EXEMPTION HAS BEEN ESTABLISHED, CAN BE EXEMPT FROM TAXATION

(Opinion dated November 12, 1917)

Where a veteran sells a piece of property, as to which the exemption from taxation has been established, and with the proceeds purchases another piece of property, the legislative intent requires that such veteran should not lose his exemption thereby.

Under the legislative intent, as clearly appears from the language of the statute, real property purchased with the proceeds of a pension granted by the United States for military or naval services can be made exempt from taxation for all purposes, except local school purposes and the construction and maintenance of highways, to the amount of the pension money invested therein (not exceeding \$5,000), as long as it is owned or occupied by the pensioner or his wife or widow, and such exemption can be established notwithstanding the fact that the pension money had been previously invested in real property owned by the pensioner which had been sold and proceeds reinvested in another piece of real property which is now claimed to be exempt.

An inquiry, together with a request for an opinion thereon, was submitted by an individual citizen as follows:

"If real property owned by a pensioner, upon which exemption has been established, is sold and the proceeds used in the purchase

of another piece of real property, can the second piece, purchased with the proceeds arising out of the sale of the former property, be made exempt from taxation?"

LEWIS, Attorney-General.— Specific provision is made in subdivision 5 of section 4 of the Tax Law, that property purchased with the proceeds of a pension granted by the United States for military or naval services owned and occupied by the pensioner or his wife or widow, can be made exempt from taxation for all purposes, except local school and highway taxes, to the amount of the pension money which entered into the purchase price of the premises, not, however, exceeding the sum of \$5,000. The property is assessed by the local assessors, and unless exemption is claimed and established as provided in and by the above mentioned statute it is taxable the same as other real property.

The purposes of this law are very manifest. It was the intention of the Legislature to exempt the military and naval veterans from the payment of taxes, except some local taxes, upon property which had been purchased with their pension money and it would not be in keeping with the spirit of the act to hold that they would lose the benefit of such exemption if their personal interests should lead them to sell such property and invest the proceeds in some other. The pension money would be reinvested in the new property and it would still retain its identity as pension money. I can see no good reason why the veteran owner of the second property should not have the same rights and privileges as were accorded to him as the owner of the first property.

In *Y. C. N. Bank v. Carpenter*, 119 N. Y. 550, where exemption was claimed under section 1393 of the Code of Civil Procedure, it was held that where the receipts from a pension can be directly traced to the purchase of property necessary or convenient for the support and maintenance of the pensioner and his family, such property is exempt, and at page 554 the court said: "It is quite obvious that such exemption can produce no beneficial effect, unless it is extended beyond the letter of the act, and given life and force, according to its evident spirit and mean-

ing. Like other statutes the section in question must be construed according to the meaning and intent of the law-makers, and so as to effectuate their intention so far as the language of the act will permit it to be done, * * * but we entertain no doubt that where the receipts from a pension can be directly traced to the purchase of property, necessary or convenient for the support and maintenance of the pensioner and his family, such property is exempt under the provisions of this statute."

In *Benedict v. Higgins*, 165 App. Div. 616, in discussing the exemption under section 1393 of the Code, the following language is used: "A pensioner may invest his pension money wherever he pleases; he may put it into a bank and he may take it out again; * * * he may put it into a house and lot and take it out again; he may buy stocks, mortgages or other securities and afterwards sell them—all this he may do with perfect impunity. He need not be alert to hide his pension from his creditors, for the law holds back their hands. The law looks with solicitude upon the veterans of our wars and wherever the pension of these veterans may be, or in whatever shape it may be, the law makes it immune against seizure by anybody under any circumstances or by virtue of any process."

I am very clearly of the opinion that it was the intention of the Legislature that property purchased with pension money should be exempted from taxation except as mentioned in the statute whenever the pensioner or his wife or widow should conform to the statutory requirements to have it made exempt, and that such privilege would follow upon the purchase of the second piece of property with the proceeds of the purchase price of former property, if the veteran can prove to the satisfaction of the assessors that the first piece was purchased with pension money, to the extent of the pension money which entered into the purchase price of either or both of such properties, not exceeding, however, the sum of \$5,000.

[Vol. 14]

Attorney-General

In the Matter of the LEGALITY OF APPLYING A STATE APPROPRIATION to Carrying out Federal Food Administration — Limits on Such Expenditures

(Opinion dated December 8, 1917)

Authority of State Food Commission to legally apply funds appropriated under the provisions of the Laws of 1917, chapter 813, to carrying out in the State of New York the act of Congress of August 10, 1917, establishing the United States food administration — such expenditures should be limited to the matters of Federal food administration in which the State of New York has a special and peculiar interest.

Chapter 813 of the Laws of 1917 establishes a State Food Commission and appropriates \$1,000,000 for food administration in this State during the war. An act of Congress known as the act of August 10, 1917, is the authority for the existence of the United States food administration. This latter act is really based on the power of Congress to provide for the national security and defense, or the so-called war powers of Congress. Being within these powers the Federal jurisdiction extends over local transactions of food commerce, and knows no confines of State or international boundaries. The moment the Federal power within the limits of the authority vested in it entered into the situation it superseded by its paramount authority State control of the food supply everywhere. When the Federal power properly steps in and takes control the State power does not co-exist, it ceases to exist. Thus the State Food Commission found itself reduced to the exercise of certain few powers given it by the State statute and not found in the act of Congress. Under these circumstances there was an agreement between the Federal and the State authorities to unify national and State food administration. For this purpose the State Food Commission has accepted a delegation of Federal power and now forms, with two Federal Food Administrators appointed for this State by the United States Food Administrator, a Federal food board of five persons, which has taken over all food administration in the State of New York, excepting such matters which can be more efficiently administered directly from Washington.

In pursuance with this arrangement the State Food Commission proposes to merge its staff with that of the Federal Food Administrators in New York State and now wishes to ascertain whether for this purpose it may apply funds appropriated by the State Legislature to some part of the expenses of the joint administration. *Held*, that in war times when the conduct of the war requires an enlargement of national activities, the taking over by a centralized administration of many duties which can in time of peace be discharged by the State, is legal, and the

State may then subject its executive to Federal direction, may accept the delegation of Federal power and may expend State moneys for the Federal administration within the State, of matters in which the State itself has a vital and immediate interest. *Held*, also, that the State may expend its money for Federal food and fuel administration, but the expenditure must be one for carrying out the act of Congress of August 10, 1917, relating to those subjects, or to any policy of the United States as to which authority is conferred upon the State Food Commission by the State law. It must also be an expenditure for carrying out such acts or policies within the State of New York, and it should also be an expenditure for some matter of administration particularly affecting the State of New York as distinguishable from other States.

The New York State Food Commission submitted a request for an opinion as to the right of that Commission to expend State funds in carrying out, as an agency of the Federal government, the act of Congress establishing a food administration, the question having arisen by reason of the following circumstances:

Chapter 813 of the Laws of New York of 1917 establishes a State Food Commission and appropriates \$1,000,000 for food administration in the State of New York during the war. The United States food administration derives its authority from the act of Congress of August 10, 1917. This act is based, not so much on the Federal power to regulate interstate and foreign commerce, as on the power of Congress "to provide for the national security and defense"—the so-called war powers of Congress. Under this authority the Federal jurisdiction extends over local transactions of food commerce. It is not confined to commerce which crosses State and international boundaries.

In working out an effective system of food control the United States food administration found it to be essential that one central authority be established for the entire country. To win the war, there must be "team play" throughout the United States. Accordingly, the Federal power entered the States and superseded by its paramount authority State control of the food supply everywhere. For it is a familiar principle of our constitutional law that when the Federal power steps in and takes control, the State power does not co-exist — it ceases to exist.

As a result of this unavoidable extension of the authority of the Federal food administration, the State Food Commission

[Vol. 14]

Attorney-General

found itself reduced to the exercise of certain few powers given it by the State statute and not found in the act of Congress.

In this situation there were conferences between the State and Federal Food Administrators. There was an agreement that it would be desirable to unify and co-ordinate National and State food administration; to place the staff of the State Food Commission in the effective service of the country; and to bring about such a utilization of the peculiar powers found only in the State statute as would be in harmony with the national policies of the United States food administration.

To these ends the State Food Commission has accepted a delegation of Federal power. By virtue thereof it now forms, with two Federal Food Administrators appointed for New York State by the United States Food Administrator, a Federal Food Board of five persons. It is intended that this board shall, under the direction of the United States Food Administration, exercise within this State a great part of the powers delegated by the act of Congress. The only powers withheld from it are those which it is believed can be more efficiently administered directly from Washington. It is also contemplated that this board shall advise the State Food Commission with respect to the exercise of its authority under the State law. Thus it is expected that there will be in future virtually (if not in point of law) but one food administration for the State of New York; and that this unified administration, having at its command both Federal and State powers, will be able to administer food control effectively, unembarrassed by conflicts of Federal and State law.

In pursuance of this scheme, the State Food Commission proposes to merge, in large measure, its staff with that of the Federal Food Administrators in New York State; and it is willing to apply the funds appropriated by the State Legislature to some part of the expenses of the joint administration, provided it may do so legally.

The State Food Commission, therefore, asks its legal adviser, the Attorney-General, for an opinion whether it is permitted to apply the \$1,000,000 appropriated by chapter 813 of the Laws of

1917 to any of the expenses of the execution by it, as a member of the Federal Food Board, of powers whose source is in the acts of Congress rather than in the State law; it being understood of course that the payments will be made by vote of the State Food Commission and not of the Federal Food Board.

In case this can be done the Commission wishes guidance further as to the legal principles, if any, which are available to govern the division of the burden of expense between the State and National appropriations.

LEWIS, Attorney-General.—The first question which presents itself for determination is the following:

1. Did the Legislature contemplate that the money appropriated might be devoted to the execution of Federal powers?

The statute was deliberately drafted in anticipation of some such delegation of Federal power to the State Commission as has been made. Sections 9, 15 and 18 of chapter 813, Laws of 1917, provide in part as follows:

“§ 15. Other powers of the commission. The food commission shall also have the following powers: * * *

“(f) To accept the delegation of any authority from the president of the United States or any person designated by him under authority of the congress of the United States under an act passed by the congress of the United States to provide further for the national security and defense by encouraging the production, conserving the supply and controlling the distribution of food products and fuel for the purpose of carrying out that act within the state of New York.”

“§ 18. Co-operation with federal authorities. Nothing in this act shall be construed to empower the commission to do any act in conflict with existing acts of congress or acts of congress hereafter enacted relating to the encouragement of agriculture and the regulation, control and distribution of necessities, or any matters and things referred to in this act. Such commission shall so far as possible co-ordinate its work with that of any officer, board or department of the United States for the purpose of putting into effective operation in this state any law of the United States dur-

[Vol. 14]

Attorney-General

ing the existence of a state of war to conserve the national supply of necessities and to regulate the distribution thereof, and likewise so far as practicable co-ordinate its work by like efforts with other states. The said commission may also accept any designation or authority conferred upon it to carry out any policy of the United States relating to subjects as to which authority is conferred upon said commission by this act within this state."

"§ 9. Information gathered for the use of the state and in aid of the federal government. * * * The commission shall transmit such information as it deems will be useful to the public interest to the federal authorities, and make such use thereof by publication or otherwise as the public interest requires within this state."

By the above sections the State Food Commission is expressly authorized to accept a delegation of authority from the United States food and fuel administrations for the purpose of carrying out the acts of Congress on cognate matters to those treated in the State statute.

The words appropriating \$1,000,000 are broad enough to include the expenses of carrying out the acts of Congress just as any other administrative duties undertaken under the State law.

"§ 23. Appropriations. For the purpose of carrying out the provisions of this act there is hereby appropriated from any money in the state treasury not otherwise appropriated the sum of one million dollars (\$1,000,000), or so much thereof as may be necessary."

However, the section being general in terms, it is open to construction. It should be so construed as to keep it constitutional; and if there is a constitutional objection to the expenditure of State money in executing Federal powers of food control within the State of New York, then the appropriating section must be limited in meaning accordingly.

2. Constitutional limitations on the expenditure of State funds for Federal purposes.

The legislative power of the State Legislature is absolute and unlimited, except as restrained by the State and Federal Constitutions or delegated to Congress by the Federal Constitution. *Lawton v. Steele*, 119 N. Y. 232; *People v. Flagg*, 46 id. 401;

Bank of Chenango v. Brown, 26 id. 467. The State Constitution does not delegate a series of powers to the Legislature; it delegates the legislative power *in toto*, and then proceeds to restrict its exercise by a series of limitations. Barto v. Himrod, 8 N. Y. 488.

Prior to the adoption of section 9 of article VIII of the present Constitution, providing that "neither the credit nor the money of the State shall be given or loaned to or in aid of any association, corporation or private undertaking," the Legislature could, and sometimes did, give money even in aid of undertakings more or less private in character. At present it may appropriate money to pay its moral obligations, such as would be unenforceable in a law suit between private individuals. Cayuga County v. State, 153 N. Y. 279.

Neither the defense of the State through the war administration of the National government nor the promotion of the National, and hence of the State, security through food legislation, is in the least a gift of State money in aid of an association, corporation or private undertaking. Lancey v. King County, 15 Wash. 9; 45 Pac. Rep. 645; 34 L. R. A. 817; Walker v. Cincinnati, 21 Ohio St. 14; 8 Am. Rep. 24. And except for the provisions of article VIII, section 9, quoted above, the Constitution does not contain any restriction requiring consideration here, on the expenditure of State funds for public purposes.

The people of the State are interested in the successful prosecution of the war. They may contribute their State funds without going beyond legitimate State functions.

In a larger aspect, the use of State money for the National, which includes the State, defense may be considered as a utilization of State power for a Federal purpose in which the State has a legitimate joint interest. That this may be done has been settled by two recent decisions. The Appellate Division of the Second Department held November 30, 1917, in *People ex rel. v. Sisson*, not yet officially reported, that the Governor might, by executive order, close saloons in the vicinity of places in the State where the Federal government is engaged in manufacturing munitions, men are encamped, and other military undertakings are in progress. The court said: "The State is bound to render loyal aid to the

[Vol. 14]

Attorney-General

government, and it is the duty of the State to safeguard its military and industrial personnel * * *. The President has power, under the draft act, to regulate the sale of liquor in or near military camps. * * * It is preferable that such regulations should be under home rule. The President, already overburdened, should not be called upon to supplement the police power of New York."

Again, the question of the State aiding the Federal government with its powers and money arose in the case involving the constitutional right of the State to condemn a site for the fort on Rockaway Beach and transfer it to the Federal government for a consideration possibly involving a loss to the State. *Rockaway Pacific Corporation v. Stotesbury*, — Fed. Rep. —. The District Court of the United States (Ward, Hough and Rogers, JJ.) held that inasmuch as the defense of the nation involved in such case the defense of the State, and the State intended simply to transfer the property to the nation so that it might be used for the defense of the State, there was no illegal use of State power or State funds. The court distinguished certain cases in which it has been held that the purchase of a site for a post office or a light-house — matters exclusively within the control of the Federal government — cannot be undertaken through State powers of eminent domain. *Trombley v. Humphrey*, 23 Mich. 471; *Kohl v. U. S.*, 91 U. S. 367. That the State may exercise its power of eminent domain in aid of a project in which it and the Federal government have a common interest was settled by the Court of Appeals in *Matter of United States*, 96 N. Y. 227. The United States sought to employ the State power of eminent domain for the purpose of acquiring lands for the improvement of navigation in the Harlem river. This was challenged as an unconstitutional loan of power by the State to the nation. But the court upheld the proceeding, saying that the State had an interest in the undertaking which warranted it in lending assistance to the United States. See, to similar effect, *State v. Milwaukee*, 156 Wis. 549; *Bilger v. State*, 63 Wash. 457; 116 Pac. Rep. 19; *Lancey v. King*, *supra*.

I have no hesitation in concluding that in war time, when of

necessity the conduct of the war requires an enlargement of national activities, the taking over by a centralized administration of many duties which can in time of peace be discharged by the States, a rigid co-ordination of governmental control in place of the decentralized management of public affairs which allows play to sectional competition,— the States may then subject their executives to Federal direction, may accept the delegations of Federal power, and may expend State money for the Federal administration, within the State, of matters in which the State itself has a vital and immediate interest.

3. Division of the expenses of administration. Although I have concluded that the State may spend its money for Federal food administration (and the Federal fuel administration comes within the same principle) it should be emphasized that there is some limit to the extent to which this may go.

(a) It must be an expenditure for carrying out the acts of Congress of August 10, 1917, relating to food and fuel, or any policy of the United States relating to subjects as to which authority is conferred upon the State Food Commission by the State law, §§ 15-f, 18.

(b) It must also be an expenditure for carrying out such acts or policy within the State of New York, §§ 15-f, 18.

(c) It should also in my opinion be an expenditure for some matter of administration particularly affecting the State of New York, as distinguished from other States; for some matter of local interest rather than purely national interest. Otherwise the expenditure might be objectionable on the grounds which influenced the decisions of the courts that the State should not assist in such purely Federal matters as the building of a post office. It is difficult, it not impossible, to state any general principle by which the line can be drawn, without reference to concrete cases. But I venture to suggest that projects of food administration applied uniformly throughout the country, with no adaptation to differing local conditions, had better be paid for out of national appropriations, even though part of the execution thereof be within the State of New York, and be performed by the Federal Food Board for this State.

[Vol. 14]

Attorney-General

In the Matter of Construing the JUDICIARY LAW, SECTIONS 466, 468, 470, the RULES OF THE COURT OF APPEALS and the CONSTITUTION, ARTICLE III, SECTION 1, in Reference to the Right of an American Woman, Who Becomes an Alien by Marriage, to Practice in the Courts of this State

(Opinion dated December 10, 1917)

The marriage of an American woman who has been duly admitted to practice in the State of New York to an alien deprives her of her right to practice in the courts of the State as she thereby becomes an alien.

An American woman who marries an alien takes the nationality of her husband and loses her United States citizenship pursuant to the provisions of 34 United States Statutes, 1228. The rules of the Court of Appeals of this State for the admission of attorneys and counselors-at-law require that applicants for admission must prove by affidavit their United States citizenship. The permission accorded by rule II of that court for the admission to practice in this State "of a person admitted to practice and who has practiced five years in another country whose jurisprudence is based on the principles of the English common law" must be construed, nevertheless, with the other provision that such a person must, however, possess "all other qualifications required by these rules" among which, as above appears, is citizenship in the United States as required by rule III. Moreover section 468 of the Judiciary Law requires that a person admitted to the bar by the Appellate Division must, prior to entering upon the practice of the law, register with the Court of Appeals and file an oath in which he states that he is "a citizen of the United States." The constitutional oath of office taken by an attorney upon admission is of course a continuing obligation binding the practitioner at all times to support the Constitution of the United States and the Constitution of the State of New York. A woman marrying an alien cannot claim this, owing to her newly assumed allegiance to a foreign country. Suggestion made that a motion before the Appellate Division to strike the lady's name from the rolls would be quite proper in order that the records be correctly preserved.

D. J. Pioselli, of New York city, submitted an inquiry, together with a request for an opinion thereon, as to whether an American woman who becomes an alien by marriage loses her right thereby to practice in the courts of this State.

LEWIS, Attorney-General.— There can be no controversy over

the fact that an American woman by marrying an alien thereby takes the nationality of her husband and loses her United States citizenship, 34 U. S. Stat. 1228; *Mackenzie v. Hare*, 239 U. S. 299. It has been similarly by statute provided and by the courts judicially determined that American citizenship is a prerequisite to admission to the practice of the law in New York State. For instance, rule III of the Court of Appeals for the Admission of Attorneys and Counsellors at Law requires that persons to be admitted to the bar by examination must prove by affidavit their United States citizenship. While rule II of the Court of Appeals does permit the admission to practice in this State "of a person admitted to practice and who has practiced five years in another country whose jurisprudence is based on the principles of the English common law," such a person must, however, possess "all other qualifications required by these rules," among which, we have seen, is citizenship in the United States required by rule III. That is to say, experience at a foreign bar does not alone make a person eligible to admission to our courts, but such person must before admission have become an American citizen. *Matter of O'Neill*, 90 N. Y. 584; *Matter of Maggio*, 27 App. Div. 129, 130. Furthermore, the Legislature has by statute established the conclusion above stated by requiring in section 468 of the Judiciary Law that a person admitted to the bar by the Appellate Division must, prior to entering upon the practice of the law, register with the Court of Appeals and file an oath in which he states that he is "a citizen of the United States."

All the qualifications for the office of attorney at law in this State are continuing qualifications, and if a person after admission to practice lose one of the essential qualifications his right to practice is gone. Upon admission an attorney takes the constitutional oath of office, which is a continuing obligation and binds the attorney at all times "to support the Constitution of the United States and the Constitution of the State of New York." Const., art. XIII, § 1; Judiciary Law, § 468. This the lady in question can no longer do owing to her newly assumed allegiance to a foreign country. She cannot hold the office of attorney at law in this State except she hold the same subject to all the duties

[Vol. 14]

Attorney-General

prescribed for that office, and she has now voluntarily placed it beyond her power to uphold the Constitution of the United States and the Constitution of the State of New York.

An analogous qualification, that of residence within the State of New York, is likewise a continuing qualification, and an attorney at law for New York State acquiring a residence in another State *ipso facto* loses his right to practice here. *Richardson v. Brooklyn City R. R. Co.*, 22 How. Pr. 368. A legislative interpretation to the same effect is found in section 470 of the Judiciary Law, which permits attorneys admitted to practice in New York State to reside in an adjoining state, thereby connoting that except for the specific legislative permission such attorneys would have lost their right to practice in New York.

Both residence within the State and United States citizenship are fundamental qualifications for admission to the practice of the law and for the continuation of such practice in the State of New York. A motion before the Appellate Division to strike the lady's name from the rolls would be quite proper in order that the records be correctly preserved.

In the Matter of Construing the TAX LAW, Chapter 726 of the Laws of 1917, as to the Exemption of the Personal Property of Certain Corporations from Taxation for Local School Purposes; Provisions of Section 219-j of that Chapter as to Such Exemption

(Opinion dated December 18, 1917)

The exemption provided by section 219-j of chapter 726 of the Laws of 1917, now article 9-a of the Tax Law, does not exempt manufacturing and mercantile corporations from taxation for local school purposes in the several school districts where personal property of such corporations is found.

Section 219-j of chapter 726 of the Laws of 1917 added a new article numbered 9-a to the Tax Law for the purpose of assessing and taxing manufacturing and mercantile corporations for the privilege of exercising their franchises and doing business within the State of New York. The

tax is based on the net income of such corporations and is to be collected at the rate prescribed in the act. It is provided by section 219-j of the act in question that manufacturing and mercantile corporations shall not be assessed upon any personal property nor upon their capital stock, as provided by section 12 of the Tax Law, nor be required to pay a franchise tax under section 182 of the Tax Law. The general scheme of the Legislature was that the school districts should not be included within the exemption provided in section 219-j. That section does not refer to such districts and no part of the taxes provided by the act is paid to them. To hold that the personal property of such corporations is exempt under section 219-j from the payment of school taxes would necessitate holding that several provisions of the Education Law which give the right to trustees of school districts to tax all such corporations for their personal estate for school purposes are repealed by implication so far as such provisions apply to the taxation of personal property of such corporations for school purposes. Such repeals are not favored by the courts.

It clearly was the intent of the Legislature to reserve the right to the school districts to assess and tax such corporations for their personal property, within the respective districts, for school purposes. The Education Law applies to the taxation of personal property of such corporations for school district purposes while article 9-a applies to the taxation of the same class of property for State, city and village purposes. By adopting this ruling both the provisions of the Education Law herein considered and article 9-a of the Tax Law are given effect whereas any other ruling would necessitate the repeal of sections 410-413 of article 33-a of the Education Law in so far as it would be in conflict with article 9-a of the Tax Law. Distinction between "tax district" occurring in section 219-j and "taxing district" specifically pointed out. There is but one logical, reasonable construction to be placed upon the exemption provided in section 219-j, which is that it never was intended or considered applicable to school districts and does not exempt personal property of such corporations from taxation for local school purposes, and that such manufacturing and mercantile corporations will remain liable to taxation upon their personal property within the several school districts, for local school purposes.

Hon. John H. Finley, Commissioner of Education, submitted an inquiry, together with a request for an opinion thereon, as follows:

"Does section 219-j of chapter 726 of the Laws of 1917, made article 9-a of the Tax Law, give to manufacturing and mercantile corporations subject to a franchise tax based upon net income, exemption from taxes levied and assessed under sections 410-413 of the Education Law or under the provisions of article 33-a of the Education Law?"

[Vol. 14]

Attorney-General

LEWIS, Attorney-General.— Chapter 726 of the Laws of 1917 added a new article, numbered 9-a, to the Tax Law for the purpose of assessing and taxing manufacturing and mercantile corporations for the privilege of exercising their franchises and doing business within the State of New York. The tax is based on the net income of such corporations and is to be collected at the rate prescribed in the act. Section 219-h directs the comptroller to pay two-thirds of all interest and penalties provided by the act into the State treasury; the balance to be paid over quarterly to the treasurers of the several counties of the State to be distributed by such treasurers to the cities, towns and villages within the counties, as provided by the act, but no mention is made of a school district, and no provision is made for the apportioning of any of such taxes to any school district.

It is provided by section 219-j of such act that after the same takes effect, "manufacturing and mercantile corporations shall not be assessed on any personal property" nor upon its capital stock, as provided by section 12 of the Tax Law, nor be required to pay a franchise tax under section 182 of the Tax Law, and closes with this sentence: "But if any manufacturing or mercantile corporation shall pay taxes on personal property or capital stock assessed in any tax district in the year nineteen hundred and seventeen, such corporation shall be entitled to credit for the amount of such taxes so paid on its account for taxes first assessed against it under this article by the tax commission, not exceeding, however, the amount of such first assessment."

It would seem that if the Legislature intended that such exemption should apply to taxes payable under the provisions of sections 410-413, or article 33-a of the Education Law, it would have mentioned such provisions as well as sections 12 and 182 of the Tax Law, inasmuch as such provisions of the Education Law are left intact, and without change as to the right of the school districts to assess and tax the personal property of such corporations within their districts. I think it more reasonable, more consistent and more in harmony with the general scheme of the legislation to hold that the Legislature intended that the school districts should not be included within the exemption provided in section

219-j. No reference is made in section 219-j to such districts and no part of the taxes provided by the act are to be paid to them. This seems significant, particularly as the provisions in the Education Law for taxing such corporations for their personal property within each district are preserved to the respective districts.

If it should be held that the personal property of such corporations is exempt, under section 219-j, from the payment of school taxes, then it follows that the above mentioned sections of the Education Law, which clearly give the right to trustees of school districts to tax all such corporations for their personal estate for school purposes, are repealed by implication so far as such provisions apply to the taxation of personal property of such corporations for school purposes. Repeals by implication are not favored by the courts.

"When both the latter and former statute can stand together, both will stand unless the former is expressly repealed or the legislative intent to repeal is very manifest." *People ex rel. Kingsland v. Palmer*, 52 N. Y. 83; *Hawkins v. Mayor*, 64 id. 18; *Watson v. City of Kingston*, 114 id. 94.

Certainly the provisions of the Education Law hereinbefore referred to were not named in the act, and there is no manifest purpose disclosed of an intention on the part of the Legislature that they should be repealed by implication. The indications are to the contrary. The failure to refer to the School Law, the failure to send any of the taxes collected under the act to the school districts, and the fact that the provisions of the School Law remain intact so far as the taxation of the personal property of such corporations within the several districts is concerned, all indicate that the Legislature intended to reserve the right to the school districts to assess and tax such corporations for their personal property for school purposes.

There can be no logical reason advanced why such corporations should be exempted from paying school taxes upon their personal property as well as upon their real estate. The Legislature formulated and passed this bill, taxing their personal property for State, city, village and town purposes, and directed how much taxes

[Vol. 14]

Attorney-General

should be collected and divided between the State and such municipalities, but made no mention of school taxes, and then left upon the statute this broad and sweeping power in the hands of school district officers: "2. The trustees shall also apportion the district taxes upon all persons residing in the district, and upon all corporations liable to taxation therein, for the personal estate owned by them and liable to taxation."

There is no repugnancy in the two acts if each is given the force which under the well understood rules of construction is applicable. The Education law applies to the taxation of the personal property of such corporations for school district purposes, and article 9-a applies to the taxation of the same class of property for State, city and village purposes.

To hold that this large volume of personal property, scattered all over the State, is exempt from the payment of all school taxes would be contrary to the long established policy of the State. Exemptions of such character are not favored or allowed unless the statute is specific or the intent of the Legislature is clear and unmistakable. This principle is so well established that the citation of authorities is unnecessary. The leading sentence of section 219-j is sufficiently plain and explicit, standing alone, to exempt such corporations from the payment of school and all other taxes except the franchise taxes mentioned in the article, but it must be considered in connection with the purposes of the act; the application of the taxes raised under it; the silence of the act as to school taxes; the undisturbed condition of the Education Law, and the severe blow that is dealt to the school districts if such corporations are exempted from the payment of all school taxes upon their personal property.

It has been stated that the school districts were not considered by those who collaborated in drafting the bill. If this were the case, it only adds another reason for holding that the exemption specified in section 219-j does not apply to taxes imposed upon the personal property of all corporations for local school purposes as provided by sections 410-413 of the Education Law. Certainly if such taxes were not thought of or considered in the drafting of

the bill, or the passage of the same by the Legislature, it cannot be claimed that there was any intent to exempt such corporations from the payment of local school taxes. It would be contrary to all the rules of construction to hold that such a large amount of personal property is exempted from taxation through inadvertence and without any intent on the part of the Legislature to allow such exemption. It cannot be possible that the courts would hold that such an amount of personal property should be exempted from taxation for local school purposes by the enactment of a law which was only intended to apply to taxes for State, city, village and town purposes and in the drafting of which such school taxes were not considered. If it were not intended to exempt such corporations from the payment of local school taxes, and it could not have been intended unless it was considered, it cannot be claimed that they became exempted through inadvertence and by implication. Such a construction would be an absurdity. It was held in *Commonwealth v. Kimball*, 24 Pick. 370, that "where any particular construction would lead to an absurd consequence, it will be presumed that some exception or qualification was intended by the Legislature to avoid such conclusion."

"A reasonable construction should be adopted in all cases where there is doubt or uncertainty in regard to the intention of the legislature." *People ex rel. Wood v. Lacombe*, 99 N. Y. 49, and numerous other cases.

It seems to me very clear that the spirit, intent and purpose of article 9-a was to formulate a method which would impose a tax upon personal property of certain corporations for State, city, town and village purposes, and that it did not intend to impair the right of school districts to continue to tax such personal property for local school purposes. If there is doubt as to the intention of the Legislature, then it should be resolved against the claims for exemption rather than to adopt a construction which would work a repeal of an important act by implication and exempt a large class of personal property from taxation for local school purposes.

It has been stated that if the bounds of a school district are

[Vol. 14]

Attorney-General

coterminous with those of a village or city that such school districts would not be harmed by the adoption of a construction that such corporations are exempt from local taxes upon their personal property, but this does not appear to me to be sound reasoning. It is true that in such districts the amount payable under the statute would be turned over to the city, town or village authorities, and such municipalities could probably apply it to whatever purposes it might desire and could devote the whole, or such portion of it as the authorities should direct, to school purposes, but even in those districts the school authorities would be at the mercy or caprice of the city, village or town authorities and might or might not receive direct benefits from such taxes. Such districts would be deprived of all right to levy taxes against a certain class of property which has heretofore been a prolific source of revenue for many districts. It is fair to assume that if the Legislature had intended that such corporation should not pay any taxes upon its personal property except that provided in article 9-a, it would have included the school districts in the division thereof and increased the amount which should be paid under the act to make up the loss which the districts sustained by being deprived of the right to tax locally for school purposes the personal property of such corporations as such property had always been taxed.

The tax specified in the article is at the rate of 3 per centum upon the net income. If a corporation has no net income, and is exempt from local school taxes, it will have no taxes to pay upon its personal property, despite the fact that it may have large value in such property within a school district. Instances have already arisen where just such conditions exist. I am also informed that there are districts in the State where such corporations have been paying upon their personal property within such districts, about 20 per cent of all the local school taxes. Can it be possible that the Legislature intended that such school districts should be deprived of all right of taxing such volumes of personal property and not be entitled to share in the taxes raised through the process provided in article 9-a?

Taxation for general purposes and taxation for local school purposes are two distinct systems of taxation. They are both general statutes, applicable to two separate and distinct purposes. The State, county, town and highway taxes are raised under one general warrant and the local school taxes are raised under a separate and distinct warrant and the assessment and collection of such school taxes are provided for under separate and distinct provisions of law. While the general exemptions provided for in section 4 of the Tax Law apply to the school system as well as to general taxation, it must be borne in mind that the class of property under consideration was not exempted from taxation under either system prior to the enactment of chapter 726, and is not exempted from school taxes by any direct provision of such act, and that such property is taxed by such article for all other purposes, and that it is apparent that the Legislature never intended to exempt such property from school taxes. "The law-makers cannot always foresee all the possible applications of the general language they use; and it frequently becomes the duty of the courts in construing statutes to limit their operation so that they shall not produce absurd, unjust or inconvenient results not contemplated or intended. A case may be within the letter of the law, and yet not within the intent of the lawmakers; and in such a case a limitation or exception must be implied." *L. S. & M. S. Ry. Co. v. Roach*, 80 N. Y. 344.

This case precisely enunciates the rule I wish to emphasize, viz.—that the law-makers did not foresee the application of the general language used in section 219-j to the school law, and while school taxes may be within the letter of the law, yet they are not within the intent of the law-makers and the act should be limited in its application to State, city, village and town taxes, and should not apply to school taxes.

A large amount of personal property owned by mercantile and manufacturing corporations has heretofore been taxable in the various school districts in which it is located, and to eliminate it by the general language employed in section 219-j without permitting such school districts to participate in the division of the

taxes would "produce absurd, unjust and inconvenient results" and would be a serious blow to *many* school districts.

It seems to me that there is but one logical, reasonable construction to be placed upon the exemption provided in section 219-j and that is that it was never intended or considered applicable to local school districts and does not exempt personal property of such corporations from taxation for such local school purposes.

An additional reason exists for the conclusion that the Legislature did not intend to include school districts in the exemption found in section 219-j. It was apprehended that personal property in many portions of the state would have been assessed in 1917 prior to the time the statute took effect, and so the statute makes provision that franchise taxes due before January 15, 1917, and taxes on personal property assessed before the act of 1917 took effect, should be paid as theretofore. The statute then proceeds: "But if any manufacturing or mercantile corporation shall pay taxes on personal property or capital stock assessed in any *tax district* in the year nineteen hundred and seventeen, such corporation shall be entitled to credit for the amount of such taxes so paid on its account for taxes first assessed against it under this article by the tax commission, not exceeding, however, the amount of such first assessment."

The result accomplished would seem to be this: A tax on personal property assessed in 1917 must be paid. But personal property of what nature? The statute declares it shall be a tax on personal property "assessed in any *tax district*." Now a school district is not a tax district, for it is excluded from the definition of a tax district as that definition appears in section 2 of the Tax Law which governs the use of the words "tax district" throughout the entire Tax Law.

"Section 2, subdivision 4. 'Tax district' as used in this chapter, means unless otherwise herein provided, a city or town of this state."

I think that the extent of the credit given outlines the extent of the exemption given. An exemption is given from the payment of taxes on personal property except where the assessment

is in the year 1917. A credit is given for the payment of such taxes in a *tax district*. Therefore the exemption from personal property taxation must be an exemption in a tax district only which leaves the personal property of such a manufacturing or mercantile corporation still subject to taxation in a school district.

This interpretation accords with section 219-h which directs the State Comptroller to turn back to county treasurers one-third of the amounts collected in the county to be apportioned and distributed by the county treasurer to the different cities.

"Section 219-h, subd. 6. As to any county not wholly included within a city the county treasurer shall within ten days after the receipt thereof pay to the chief fiscal officer of a village or to the supervisor of a town the portion of money received by him from the state comptroller to which such city, village or town is entitled, which shall be credited by such officer to general city, village or town purposes."

Not sharing in a distribution of the 3 per cent tax paid by manufacturing and mercantile corporations, the school district, it would seem, was for that very reason continued with authority to collect taxes on personal property of these corporations within the district.

The only way we can possibly construe the statute so that manufacturing and mercantile corporations in school districts shall be exempt from the payment of taxes on their personal property for school purposes, would be to read "tax district" occurring in section 219-j as meaning "taxing district," which entirely disregards the definition of "tax district" as found in section 2 of the Tax Law.

I am therefore of the opinion that there is but one logical, reasonable construction to be placed upon the exemption provided in section 219-j, and that is, that it was never intended or considered applicable to school districts and does not exempt personal property of such corporations from taxation for local school purposes, and that such manufacturing and mercantile corporations will remain liable to taxation upon their personal property within the several school districts, for local school purposes.

**In the Matter of CONSTRUING THE PROVISIONS OF THE BANKING
LAW AND THE BUSINESS CORPORATIONS LAW as to Investment
Companies**

(Opinion dated January 23, 1918)

A corporation organized under the Business Corporations Law may not have for its purposes those provided for by the Banking Law.

The question here involved is as to the rights of a business corporation to become incorporated under a certificate including certain objects covered by the Banking Law. Section 2 of the Business Corporations Law provides in part as follows: "Three or more persons may become a stock corporation for any lawful business purpose or purposes other than a moneyed corporation or a corporation provided for by the banking, the insurance * * * laws * * * by making, signing, acknowledging and filing a certificate * * *." Article VII of the Banking Law provides for the incorporation of investment companies and section 293 of that law provides that in addition to the powers conferred by the General Corporation Law and the Stock Corporation Law such companies shall have certain powers which are specifically enumerated in said section 293 of the Banking Law. The company proposing to incorporate has in its certificate the provision that it shall have power to do the various things quoted in the opinion herein. *Held*, that the proposed object is within the provisions of section 293 of the Banking Law and that it is improper to have it in a corporation which proposes to incorporate under the Business Corporations Law.

Hon. Francis M. Hugo, Secretary of State, submitted the following form as to statement of purposes in a certificate of incorporation drawn pursuant to the provisions of the Business Corporations Law, with a request for an opinion as to whether the said statement of purposes is such as to include the powers of an investment company as defined by the Banking Law:

"To lend money for itself or as agent on bonds secured by mortgage on real property or upon personal property, and to lend money and make advances from time to time on bonds, secured by mortgages for future advances on real property or upon personal property. To lend money to be secured by bonds and mortgages upon real estate in the City of New York, and to take such mortgages in the name of the company, or of such trustee or trustees

as its board of directors may appoint and designate for the purpose, by an instrument in writing to be recorded in the office of the Register of the County of New York or any other county designated by its board of directors, and to issue bonds or debentures against such mortgages to an amount equal to the amount loaned, upon the security of such mortgages, in such denominations as the board of directors may, by resolution duly passed, provide."

LEWIS, Attorney-General.—A corporation organized under the Business Corporations Law may not have for its purposes those provided for by the Banking Law. This prohibition is found in section 2 of the Business Corporations Law which provides in part as follows: "Three or more persons may become a stock corporation for any lawful business purpose or purposes other than a moneyed corporation, or a corporation provided for by the banking, the insurance * * * laws * * * by making, signing, acknowledging and filing a certificate * * *."

Article VII of the Banking Law provides for the incorporation of what are known as investment companies, and section 293 of that law provides that such a corporation, in addition to the powers conferred by the General Corporation Law and Stock Corporation Law shall, subject to the restrictions and limitations contained in said article VII, have the following powers:

"1. To sell, offer for sale or negotiate bonds or notes secured by deed of trust or mortgages on real property situated in this state or outside of this state, or choses in action owned, issued, negotiated or guaranteed by it; to advance money upon the security of such bonds, notes or choses in action; to purchase or otherwise acquire such bonds, notes or choses in action and to pledge them to secure the payment of collateral trust bonds or notes; to sell or otherwise negotiate such collateral trust bonds or notes.

"2. To receive money or property in instalments or otherwise from any person or persons, with or without an allowance of interest upon such instalments; to enter into any contract or under-

[Vol. 14]

Attorney-General

taking with such persons for the withdrawal of such money or property, at any time, with any increase thereof, or for the payment to them or to any person of any sum of money at any time, either fixed or uncertain."

The proposed corporation, among other things, states that one of the purposes for which it is incorporated is "to lend money * * * on bonds secured by mortgage on real property * * * and to lend money * * * from time to time on bonds secured by mortgages for future advances on real property, * * *. To lend money to be secured by bonds and mortgages upon real estate in the city of New York * * *."

Said section 293 of the Banking Law provides that investment companies may "sell * * * bonds or notes secured by deed of trust or mortgages on real property situated in this state * * *," and may "advance money upon the security of such bonds * * *."

The proposed object quoted comes, in my opinion, within the provisions of said section 293 of the Banking Law. This appearing, it is improper to have it in a corporation which proposes to incorporate under the Business Corporations Law.

IN THE MATTER OF CONSTRUING CHAPTER 2534 OF THE UNITED STATES STATUTES and ARTICLE II, SECTION 1, OF THE CONSTITUTION OF THE STATE OF NEW YORK as to Qualifications of Women Voters

(Opinion dated January 26, 1918)

An American woman who marries a foreigner takes the nationality of her husband and cannot regain her citizenship so long as the marital relations legally exist.

An American woman not only loses her citizenship by contracting marriage with a foreigner but she cannot regain it except through the naturalization of her husband or a legal termination of their relations. Chapter 2534, section 3, United States Statutes, provides that on the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year

with a Consul of the United States, or by returning to this country, or, if residing here, by continuing to reside here. *Held*, that in this State not only does an American woman not regain her citizenship so long as the marital relations with a foreign husband exist but inasmuch as citizenship is a prerequisite qualification for the exercise of suffrage an American woman married to a foreigner cannot vote until her husband has been naturalized or she is restored to citizenship by such legal termination of the marital relations as provided in chapter 2534, section 3, United States Statutes.

The board of elections of the city of New York submitted inquiries, together with a request for an opinion thereon, the said inquiries being as follows:

"1. Can an American born woman married to an unnaturalized foreigner residing in the State of New York obtain her own naturalization although her husband does not choose to be naturalized?

"2. Can the said woman cast her vote on the strength of her American birth without being naturalized although married to the said unnaturalized foreigner?"

LEWIS, Attorney-General.—The Constitution of the State of New York gives to every citizen the privilege of suffrage upon the condition that such person has been a citizen for ninety days, an inhabitant of the State for one year next preceding an election, for the last four months a resident of the county and for the last thirty days a resident of the election district in which he or she may offer his or her vote, providing, however, that a citizen by marriage shall have been an inhabitant of the United States for five years.

A woman born in the United States expatriates herself by contracting marriage with a foreigner. Chapter 2534, section 3, United States Statutes, enacted March 2, 1907, provides that "any American woman who marries a foreigner shall take the nationality of her husband."

This act was declared constitutional by the United States Supreme Court in *Matter of Mackenzie v. Hare*, 239 U. S. 299. Mr. Justice McKenna, in delivering the opinion of the court, said:

"The identity of husband and wife is an ancient principle of our jurisprudence. It was neither accidental or arbitrary and worked in many instances for her protection. There has been it is true, much relaxation of it but in its retention, as in its origin, it is determined by their intimate relation and unity of interests, and this relation and unity may make it of public concern in many instances to merge their identity, and give dominance to the husband. It has purpose, if not necessity, in purely domestic policy; it has greater purpose and, it may be, necessity, in international policy. And this was the dictate of the act in controversy. * * *

"It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen. The law in controversy does not have that feature. It deals with a condition voluntarily entered into, with notice of the consequences. We concur with counsel that citizenship is of tangible worth, and we sympathize with plaintiff in her desire to retain it and in her earnest assertion of it. But there is involved more than personal considerations. As we have seen, the legislation was urged by conditions of national moment. * * * The marriage of an American woman with a foreigner has consequences of like kind, may involve national complications of like kind, as her physical expatriation may involve. Therefore, as long as the relation lasts it is made tantamount to expatriation. It is as voluntary and distinctive as expatriation and its consequence must be considered as elected. This is no arbitrary exercise of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid but demanded."

The above ruling of the United States Supreme Court has conclusively determined the status, as to citizenship, of a woman born under the jurisdiction of the United States and married to a native of a foreign country who resided in the United States.

Expatriation may be a heavy penalty imposed for the privilege of contracting marriage with a foreigner, but when viewed from the standpoint of our national welfare it becomes the dictate of necessity.

Under the law a woman not only loses her citizenship by contracting marriage with a foreigner but she cannot regain it except through naturalization of her husband or a legal termination of the marital relations. Said chapter 2534, section 3, United States Statutes, further provides: "At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a Consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein."

In conclusion I hold

1. That an American born woman married to a foreigner, residing in the State of New York, cannot regain her citizenship so long as the marital relations legally exist.

2. That inasmuch as citizenship is a requisite qualification for the exercise of suffrage, a woman married to a foreigner cannot vote until her husband has been naturalized, or she restored to citizenship upon the legal termination of the marital relations as provided in chapter 2534, section 3, United States Statutes.

In the Matter of Construing the Civil Service Law, Section 21-a, Being Chapter 438 of the Laws of 1916, in Relation to Pensions for Honorably Discharged Veterans of the Civil War Who for Ten Consecutive Years or Upwards, Immediately Preceding Their Attaining the Age of Seventy Years, Have Been Employed in Seasonal Work upon the Canal

(Opinion dated January 28, 1918)

Right of veterans of the Civil War to State pensions in certain cases.

Among the employees of the State doing canal work are certain men in what is known as the "seasonal" class. They are appointed at the beginning of May each year and serve during the canal season up to about December first. During the closed period of the canals they are laid off. Among these men are a number of veterans of the Civil War who have worked under this system for ten years or more. The question here presented is as to whether these men are entitled to receive from the State a pension amounting to one-half of their compensation for the last

[Vol. 14]

Attorney-General

year of service. "Seasonal" positions are recognized by the State Civil Service Commission and such appointees in the competitive class are made subject to the provisions of the rules of the Commission. The words requiring a continuous employment for a term of ten years should not be construed literally. These veterans worked the greater part of each of the past ten years for the State and the only reason they did not work the omitted portion of the year was because they were laid off on the closing of the canal. They should be allowed and paid a sum equal to one-half of their salaries or wages during the last year of their service, but not to exceed the sum of \$1,000 per annum.

Hon. W. W. Wotherspoon, Superintendent of Public Works, submitted an inquiry, together with a request for an opinion thereon, as to whether veterans employed in the Department of Public Works who have rendered service for the State each and every season for ten years or more before they arrive at the age of seventy years, are entitled to be placed upon a retired list and given an annual pension of one-half of the salary or wages paid them during the last year of their service for the State.

LEWIS, Attorney-General.—It appears from your inquiry that there are a number of employees of the State doing canal work in what is known as the "seasonal" class. These employees are appointed at the opening of canal navigation, on or about May first each year and serve until the season closes, about December first. From that time until the opening of operations in the following year, they are laid off, so that during the closed period they do not render any service for or receive any compensation from the State. There are a number of honorably discharged veterans of the Civil war who are employed in such seasonal work and the question now arises,—are such veterans of the Civil war who have worked in that manner for ten years or more entitled to be retired upon reaching the age of seventy years and to receive from the State a pension amounting to one-half of their compensation for their last year of service.

Chapter 438 of the Laws of 1916, being an amendment of the Civil Service Law, and forming section 21-a thereof, provides, in substance, that every honorably discharged soldier, sailor or

marine in the Civil war, "who shall have been employed for a *continuous* period of ten years or more in the civil service of the state of New York, and who shall have reached the age of seventy years," may upon his own request be retired from employment, and thereafter during his life be entitled to receive from the State, through the department or institution which employed him at the time of his retirement, a sum which shall amount to one-half the salary or wages paid to him in the last year of his employment, not, however, to exceed the sum of \$1,000 per annum.

I have held, as well as my predecessor, General Woodbury, held, that the ten years of service must have been continuous for a term of ten years immediately prior to the veteran's retirement. I have not held that the ten years' continuous service must have been every day or even every month of the ten years immediately preceding his retirement. The employment should be such portion of every one of the ten years immediately preceding his retirement as the State might or did require his services. It is a fact well known to all of us that there are several branches of the State government in which the employees cannot be given employment during the winter season and they are laid off during that time without compensation, but if the employee holds himself in readiness to resume his work as soon as the season opens, it would be only fair and equitable that his labor as such seasonal employee should receive the same consideration, so far as the benefits of this act are concerned, as the employee who works the entire year and received wages for the entire year. An employee who only works eight months in a year is only paid for that time and his annual compensation is proportionately less; and, as the pension is based upon his last year's compensation, it will also be proportionately less. I think it is fair to assume that the Legislature did not intend to discriminate unjustly against the seasonal employee by using the term "for a continuous period of ten years." The purposes of the act should be considered in its interpretation. This statute is along the same general line found in various other statutes of the State, to wit: To give preference

[Vol. 14]

Attorney-General

to the old veterans in civil positions to which they are eligible; to assist them in their declining years; and to place them above penury and want in the weakness of old age, without subjecting them to the humiliation of seeking public charity or being placed upon a level with the ordinary pauper,—all out of consideration for the services they rendered our country in the days of civil strife, and for ten years' faithful service to the State. While the Législature has required ten years' continuous service, it would be giving it a very narrow construction to hold that the veteran must have rendered services every day or every month during that period. To give it such a construction would exclude almost every soldier, sailor or marine from its benefits, as there would be very few, if any, who could show ten years of constant service without some slight break in the continuity thereof; but where the party has been for ten years immediately preceding his application for retirement employed the best part of each year for the State he has sufficiently met the requirements of the statute to render him eligible for a pension.

I held in an opinion to the assistant corporation counsel of the city of Albany under date of December 17, 1917, that a street sweeper who had been employed by the city for seventeen years prior to the application, but whose work was suspended almost entirely during the winter months, came fairly within the terms of the act and was entitled to a pension as provided therein.

Season positions are recognized by the State Civil Service Commission and seasonal appointees in the competitive class are made subject to the provisions of the rules of the Commission.

It was held by the Circuit Court in *Matter of Schneider*, 164 Fed. Rep. 335, that the words "resided continuously within the United States for at least five years," in the Naturalization Act were not to be used literally as requiring the applicant to remain at all times physically within the jurisdiction of the United States. In that case the applicant had enlisted in the navy and was absent from the United States a large portion of the five years. The court said, at page 336: "The word 'continuously,' which is not found in the act of 1802, cannot be con-

strued literally; else a resident of New York would lose his right if he paid a visit to Europe at any time during the first four years of his residence, or spent a day in Jersey City within the year immediately preceding the day of filing his petition. The use of the word may be to prevent any intermediate change of domicile during the five years."

I take it, therefore, that the words requiring a continuous employment for a term of ten years should not be construed literally as requiring the veteran to have been employed every day or every month during the whole period of ten years immediately preceding his application. The employees under consideration worked the larger part of each year for the last ten years prior to their retirement and the only reason they did not work the omitted portions of the year was because they were laid off on the closing of the canals.

I think the old veterans are entitled to a fairly liberal construction of the statute and I therefore advise you that all such seasonal employees whose services have continued during the open season upon the canals for each of the ten years immediately preceding their application for retirement, should be allowed and paid through your department a sum equal to one-half of their salaries or wages during the last year of their service, but not to exceed the sum of \$1,000 per annum.

In the Matter of Construing the Military Law, Section 14, as Amended and Renumbered by Chapter 644, Laws of 1917, in Reference to a Provision of Such Law that the Articles of War of the United States Army Shall Be in Force at All Times as to the Land and Naval Forces of the State in so far as Consistent with the Military Law and the Regulations Issued Thereunder

(Opinion dated January 29, 1918)

Military courts have no jurisdiction over civilians except in the actual theater of war or where martial law has been declared.

A New York Guard sentry on duty guarding the Barge canal was shot at by a civilian. The assailant was arrested by members of the New

[Vol. 14]

Attorney-General

York Guard. The question is now presented as to whether he can be tried by a court martial. Section 14 of the Military Law, as amended and renumbered by Laws of 1917, chapter 644, provides that the Articles of War of the United States army shall apply to the land and naval forces of the State so far as consistent with the Military Law and its regulations. Article XII of the Articles of War provides that general courts martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals. Article II of the Articles of War defines persons subject to military law and members of the New York Guard cannot be held to be within the terms of this definition nor can it be held to include civilians not directly connected with the New York Guard. A general court martial therefore has no power to try the civilian in question as he is not subject to military law nor is he within the operation of martial law because that only exists in the actual theater of warfare or where martial law has been actually declared. The civilian mentioned in the inquiry is not amenable to the jurisdiction of a court martial but should be delivered over to the civil authorities and prosecuted by the district attorney in the civil courts.

Brig-Gen. Charles H. Sherrill, Adjutant-General, submitted an inquiry, together with a request for an opinion thereon, based upon the following occurrence: A civilian discharged a pistol at a New York Guard sentry on duty guarding the Barge canal. He has been arrested by members of the New York Guard. Is he amenable to the jurisdiction of a court martial?

LEWIS, Attorney-General.—Section 14 of the Military Law (as amended and renumbered by Laws of 1917, chap. 644) provides that the Articles of War of the United States army shall be in force at all times as to the land and naval forces of the State in so far as consistent with the Military Law and the regulations issued thereunder.

Article XII of the Articles of War provides that general courts martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals. Section 130 of the Military Law provides that military courts of the State shall be constituted like and have cognizance of the same subjects and possess like

powers, except as to punishments, as similar courts provided for by the laws and regulations governing the army of the United States. Article II of the Articles of War defines persons subject to military law. Speaking briefly, this definition may be said to include soldiers of the United States, retainers to the camp, and persons accompanying or serving with the armies of the United States in the field or without the territorial jurisdiction of the United States, persons under sentence adjudged by courts martial, and persons admitted into regular army soldiers' home. It is obvious that this definition cannot apply in the case of the New York Guard. But we might paraphrase it in holding that persons subject to military law under the State are members of the militia in active service and in case of actual warfare, insurrection, riot, etc., persons accompanying and serving with the militia, also persons under sentence lawfully adjudged by courts martial (whose terms of enlistment may have expired). It is perfectly clear that this definition cannot be held to include civilians not directly connected with the New York Guard. The provision of the Articles of War with respect to retainers to the camp, etc., came down from the original Military Code of the United States of 1775, which derived it from a corresponding British article. It is held to include such persons as officers' servants, newspaper correspondents, telegraph operators, etc., civilians attending the army and actually in the employment and service of the government. The article is very strictly construed and it might be said that at present there is really nobody with the New York Guard whose case would be parallel to that of the retainers to the camp, etc., defined in subdivision D of article II of the Articles of War.

It is clear then that a general court martial under the first part of article XII has no power to try the civilian in question as he is not a person subject to military law. The question remains whether he can be brought within the term "any other person who by the law of war is subject to trial by military tribunals." The "law of war" as used in article XII means martial law. Martial law ordinarily only holds in the actual theatre of war.

[Vol. 14]

Attorney-General

fare, although sometimes in cases of riot or insurrection it is declared to exist at the scene of the trouble. Martial law has been defined to mean really nothing but the will of the commanding military officer. But it is not necessary for us to go into a definition of martial law, or to consider the jurisdiction of courts martial under it, for it is an obvious fact that the State of New York is not at present under martial law, and that the Barge canal is not the scene of hostilities.

I do not think that a civilian, even though he may shoot at a soldier doing his duty, is one of the persons defined in article XII of the Articles of War unless he commits that act in a place where martial law is in control.

The jurisdiction of special courts martial and summary courts martial is even narrower than that of general courts martial, and it is not necessary for me to consider the question of whether they could possibly have jurisdiction.

In *People ex rel. Frey v. Warden, etc.*, 100 N. Y. 20, the Court of Appeals said (p. 25): "Courts martial and delinquency courts are tribunals of special and limited powers, having jurisdiction only of offenses against military discipline committed by persons belonging to the particular branch of the service for which such courts are organized."

The *Cyclopedia of Law and Procedure* says: "The jurisdiction of courts martial is special, and is limited to military offenses and persons connected with the military service. Since courts martial are executive agencies they cannot assume the functions and jurisdiction properly belonging to the civil courts, except where martial law has been established." 27 Cyc. 498. See also *Smith v. Shaw*, 12 Johns. 257.

My conclusion is that the civilian mentioned in the inquiry is not amenable to the jurisdiction of a court martial but that he should be delivered over to the civil authorities and prosecuted by the district attorney in the civil courts.

COMPTROLLER

In the Matter of the APPRAISAL OF ESTATES Where There Are Additional Taxes on Investments in Certain Cases under the Taxable Transfer Law

(Dated October 22, 1917)

Investments upon the transfer of which the Legislature has power to lay additional burdens.

The question has been raised as to whether, if certain investments are held by the appraiser to be subject to the additional tax imposed by section 221-b of the Transfer Tax Law, the Surrogate has power to assess an additional tax and incorporate it in the taxing order, and against whom, in such case, it should be assessed. The section in question, section 221-b, relates to "additional tax on investments in certain cases." This section provides that upon every transfer of an investment, as defined in article 15 of the Taxable Transfer Law, taxable under this article, a tax is imposed in addition to that imposed by section 221-a, unless the tax on such investment as prescribed by article 15 of such law or on a secured debt as defined by former article 15 of such law shall have been paid on such investment or secured debt or unless it can be shown that a personal property tax was assessed and paid on such investment during the period it was held by decedent, or unless the latter was engaged in the purchase and sale of investments as a business and held such investment for sale for the purpose of such business and not as an investment. It is apparent that the clear intent of this new section 221-b is to impose an additional tax upon every transfer of an investment of the character defined in article 15 of the Tax Law which the decedent owned at the time of his death unless the same was within one of three classes of investments which are specifically set forth in the opinion. This extra taxation is a tax on the right of succession and in all respects similar to the tax on the transfer mentioned in section 220 of the Tax Law. The Surrogate therefore would have the like power under article 10 of the Tax Law to determine the additional tax. The order of assessment should assess this additional tax against the executor or administrator.

Marshall C. Bacon of New York city submitted a statement of facts and an inquiry based thereon, showing that he represents an estate in which are certain investments which he believes are subject to the additional tax imposed by section 221-b of the

[Vol. 14]

Comptroller

Transfer Tax Law, and asking if the appraiser so reports whether the surrogate has power to assess an additional tax and incorporate it in the taxing order, and further, if it is so incorporated, against whom the additional tax should be assessed.

TRAVIS, Comptroller.—Section 221-b to which reference is made reads as follows:

“§ 221-b. *Additional tax on investments in certain cases.* Upon every transfer of an investment, as defined in article fifteen of this chapter, taxable under this article, a tax is hereby imposed, in addition to the tax imposed by section two hundred and twenty-one-a, of five per centum of the appraised inventory value of such investment, unless the tax on such investment as prescribed by article fifteen of this chapter or the tax on a secured debt as defined by former article fifteen of this chapter shall have been paid on such investment or secured debt and stamps affixed for a period including the date of the death of the decedent or unless the personal representatives of decedent are able to prove that a personal property tax was assessed and paid on such investment or secured debt during the period it was held by decedent; or unless the decedent was actually engaged in the bona fide purchase and sale of investments as a business, and at the time of his death had maintained an office or place of business in this state for the carrying on of the actual bona fide business of purchasing and selling investments, as distinguished from the purchase thereof for investment purposes, and had owned and held such investment for sale for the purpose of his business and not as investment for a period of not more than eight months prior to his death.”

Section 221-a, which immediately precedes the foregoing section, provides for the “rates of tax” on the *transfer* of a decedent’s property by will or the intestate laws or as otherwise indicated by the several subdivisions of section 220 of the Transfer Tax Law.

Therefore it is apparent that the clear intent of this new section 221-b is to impose, as it states, “*an additional tax*” upon every *transfer* of an investment of the *character* defined in article

15 of the Tax Law, which the decedent owned at the time of his death, *unless*—

a. The tax on such investment as prescribed by article 15 of the Tax Law had been paid and the proper stamps attached thereto, *or*

b. A personal property tax was assessed and paid on such investment during the period it was held by the decedent, *or*

c. The decedent was engaged in the purchase and sale of such investments as a business and held such investments for sale, etc.

It seems to me we should first consider whether the Legislature has the power to classify and impose a heavier transfer or inheritance tax upon the transfer of *one class of property* than it does upon the other property owned by a decedent at the time of his death. If the Legislature has this power then I can see no reason why the surrogate cannot assess the *additional tax* in his taxing order immediately following the tax upon individual transfers taxed under section 221-a aforesaid.

The Court of Appeals in *People ex rel. Farrington v. Mensching*, 187 N. Y. 8, in referring to the power of the Legislature to classify property for taxation purposes (*People ex rel. Hatch v. Reardon*, 184 N. Y. 31, said: “* * * We held that ‘The legislature has power to classify as it sees fit by imposing a heavy burden on one class of property and no burden at all upon others,’ provided ‘all persons and property in the same class are treated alike’ and ‘the tax is imposed equally upon all property of the class to which it belongs.’ In discussing the subject we said that: ‘While a tax upon a particular house or horse, or the houses or horses of a particular man, or on the sale thereof would obviously invade a constitutional right, still a tax upon all houses, leaving barns and business buildings untaxed, or upon all horses or the sale thereof, leaving sheep and cows untaxed, however unwise, would be within the power of the legislature. * * * The equal protection of the laws ‘only requires the same means and methods to be applied impartially to all the constituents of each class, so that the laws shall operate equally and uniformly upon all persons in similar circumstances.’ (*Kentucky Railroad Tax Cases*, 115

[Vol. 14]

Comptroller

U. S. 321, 337.) Or, in other words, all persons must 'be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed.' *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 293; *Hayes v. Missouri*, 120 U. S. 68; *Barbier v. Connolly*, 113 U. S. 27, 32.)"

"* * * While the legislature has wide latitude in classification its power in that regard is not without limitation, for the classification must have some basis, reasonable or unreasonable, other than mere accident, whim, or caprice. There must be some support of taste, policy, difference of situation or the like, some reason for it even if it is a poor one."

Although the language of the Court of Appeals which I have just quoted is found in the opinion of the court determining that section 1 of chapter 414 of the laws of 1906, amending the Stock Transfer Act, was unconstitutional, yet I believe this language clearly indicates that the Legislature has power to classify property and impose additional burdens upon the transfer of it under the transfer tax statute. To ascertain the actual property subject to this *additional tax* the analysis of section 221-b defines such property to be

First. All the investments "as defined by article fifteen" of the Tax Law;

Second. *Excepting* such of said investments as have paid the tax under said article 15 of the Tax Law; or upon which a personal property tax was assessed and paid during the period it was held by the decedent; or where such investments were held for sale in the owner's business at the time of his death.

When all of the facts just mentioned are ascertained we then have a distinct class of investments, the transfer of which is subject to the additional tax provided by section 221-b of the Tax Law. The additional tax on the transfer of this class of investments, so far as I can see, will operate equally and uniformly upon the transfers of these particular investments where the circumstances are similar. Assuming that the Legislature has the power to make this classification of property and impose an additional burden thereon, the fact that the Legislature imposed

this additional tax *upon the transfer of the investment* and placed section 221-b in article 10 of the Tax Law makes it clearly a tax on the right of succession and in all respects similar to the tax upon the other transfers mentioned in section 220 of the Tax Law; and therefore I believe the surrogate would have the like power under article 10 of the Tax Law to determine the additional tax.

The further inquiry as to whom this additional tax should be assessed against has engaged the attention of the department for some time. It may be that the requirements of the statute would be met by the surrogate reciting in his order a list of the investments subject to the additional tax, with their appraised inventory value as shown by the report of the appraiser, and extending the additional tax of 5 per centum thereon, respectively. The department has recommended, however, that inasmuch as the statute makes the executor or administrator of the estate personally liable for the payment of transfer taxes, that the order should assess this additional tax against the executor or administrator; and this suggestion has been followed in the few estates having this class of investments wherein appraisal proceedings have been had and orders have been entered since July 1, 1917, when section 221-b became a law.

In the Matter of the Provisions of SECTION 221-b OF THE TAX
LAW for an Additional Tax under the Taxable Transfer Act
in Certain Cases

(Dated October 30, 1917)

Basis upon which the additional tax under section 221-b of the Tax Law should be computed.

The transfer tax under section 221-b of the Tax Law, added by chapter 700 of the Laws of 1917, must be computed at the rate of 5 per cent upon the appraised inventory value of each investment liable to the additional transfer tax under this section.

A question of fact with an inquiry based thereon has been presented to the State Comptroller in reference to the taxable transfer under section 221-b of the Tax Law as follows:

[Vol. 14]

Comptroller

"A decedent died intestate, October 30, 1917, leaving a wife and two children and personal estate only.

His gross personal estate was.....	\$50,000
Deductions	5,000

Net estate	<u>\$45,000</u>
------------------	-----------------

"Tax under section 221-a:

			Exempt	Net Transfer	Tax
Widow	$\frac{1}{2}$	\$15,000	\$5,000	\$10,000	\$100
Son	$\frac{1}{2}$	15,000	5,000	10,000	100
Daughter	$\frac{1}{2}$	15,000	5,000	10,000	100

"In his personal estate was \$10,000 in bonds subject to taxation under section 221-b of the Tax Law, included in the gross estate of \$50,000 as above stated.

"Are these \$10,000 of bonds at their appraised inventory value subject to the 5 per cent tax, amounting to \$500, or must we first deduct therefrom one-fifth of the deductions and one-fifth of the exemptions above stated, amounting to \$4,000, and impose the 5 per cent additional tax on \$6,000 only?"

TRAVIS, Comptroller.—I have advised several of our attorneys that under section 221-b *the whole appraised inventory value of the investment* is liable to the additional tax of 5 per cent, and orders have been entered accordingly.

I realize, of course, that the courts have heretofore told us that under article 10 of the Tax Law it is proper to impose the tax upon the *net* estate only after debts, testamentary expenses, commissions, etc., have been deducted therefrom, for the reason that the net estate is all that is actually transferred to the legatees or distributees. In other words, the legatee or distributee only gets whatever is left after the payment of debts, testamentary expenses, etc.

If this same reasoning is to apply in assessing the additional tax under section 221-b then, of course, it might be proper to deduct a proportionate part of the deductions from the appraised

value of the particular investments which are subject to this additional tax.

Section 221-b says: "Upon every *transfer* of an investment, as defined in article fifteen of this chapter, taxable under this article, a tax is hereby imposed, in addition to the tax imposed by section two hundred and twenty-one-a," etc.

To ascertain this tax and give the surrogate jurisdiction to assess it this additional tax must be upon the *transfer of the investment*, and, as heretofore stated, the courts have said that the *actual taxable transfer* is what is left after the debts, testamentary expenses, etc., are deducted.

But section 221-b says this additional tax assessed upon the transfer of a specifically defined class of property shall be five per centum of the appraised inventory value of such investment; and we can not impose a tax upon the "*appraised inventory value*" of an investment if we first deduct any sum whatsoever from such appraised inventory value.

If former section 221 of the Tax Law, and more recently section 221-a had imposed a tax of 1 per cent or 5 per cent (according to the relationship of the legatee or distributee) on the transfer of a decedent's estate, and such tax was either "1 per cent" or "5 per cent" of the *appraised inventory value* of each item of the decedent's property, I doubt very much if the courts would have felt justified in allowing any deduction whatsoever before extending the tax. Under section 221 and section 221-a the tax is not on the *appraised* value of each asset of an estate but is upon the *amount* transferred to the particular legatee or distributee, and the court could very reasonably say that under these sections of the tax law it was only intended that the tax should impinge upon the *amount* the legatee or distributee actually received. But, as above stated, section 221-b expressly provides that if the investments are liable to this additional tax it must be 5 per cent of the "*appraised inventory value*," and this language necessarily precludes any consideration as to how much or what amount the legatee or distributee may actually receive. This additional tax upon the class of investments affected by the provisions of

[Vol. 14]

Comptroller

section 221-b becomes the State's property instantly upon the death of the owner without any reference whatsoever to the *amount* which the legatee or distributee may actually receive.

When the statute expressly provides how and upon what basis a tax must be determined the courts must follow the statute; and they have so held in respect to determining the tax on life estates where the life tenant only lived a few months after the decedent's death, although his expectancy of life was thirty years or more. See *Matter of White*, 208 N. Y. 64.

I am therefore of the opinion that the transfer tax under section 221-b of the Tax Law must be computed at the rate of 5 per cent upon the appraised inventory value of each investment liable to taxation under this section of article 10 of the Tax Law.

IN THE MATTER OF THE GENERAL SCOPE OF THE OFFICIAL DUTIES
OF THE STATE COMPTROLLER

(Dated November 1, 1917)

Public finances—outline of, as shown by the details of work in the State Comptroller's office.

Authority of State Comptroller and duties devolving upon him—the several bureaus of audit, court and trust fund, finance, investment tax, land tax, mortgage tax, municipal accounts, stock transfer tax, transfer (inheritance) tax, and miscellaneous matters with which the office of Comptroller has to deal.

TRAVIS, Comptroller.—The scope and method of raising revenue for the support of our State government presents one of the greatest determining factors in the life of our people. Yet the ignorance and willful disregard in the past of the necessary means have powerfully encouraged a wide-spread belief that our citizens should look to their government for support rather than that they should support the government. To this defective education may be attributed the common confusion between the payment of taxes and the benefits therefrom. We grow up from

youth and find roads and bridges, schools and churches—in short, all the necessary State government provided as free as air. We have only to live to experience their benefits. Yet the problems connected with the raising of necessary revenues are seldom ever discussed.

Consequently, we enter upon our duties as citizens not only in ignorance of the methods by which the cost of these privileges are defrayed, but also with a positive disinclination to receive instruction upon the subject. In brief, it is one of our most singular habits of mind that we continue to neglect the study of the most vital subject that concerns the welfare of the citizens. Probably not one citizen out of a hundred can be induced to think about how much our Commonwealth costs us annually. As long as this is the situation, it is difficult to see how our State government can be more economically managed.

AUDIT BUREAU

The character and volume of the business transacted by State Comptroller Travis' office have increased so tremendously during recent times as to require the establishing of twelve separate bureaus employing over 250 persons. The annual receipts and expenditures have grown to exceed \$120,000,000, but more important still is the fact that the volume of the treasury transactions during the last few years has grown with such rapidity as to make necessary a complete transformation in the accounting and auditing methods.

The Audit Bureau has devised and installed uniform systems of accounts in all the penal, charitable and curative institutions, and in this way closer co-operation and co-ordination have been created between the State Comptroller's office and the different departments under his control.

COURT AND TRUST FUND BUREAU

One of the most striking instances of centralized control in New York State is the strict supervision exercised by State Comptroller Travis' department over all local officials having the

[Vol. 14]

Comptroller

custody of public money. This system of supervision was the result of investigations which proved that much loss and waste had been due to ignorance rather than dishonesty.

When we stop to consider that the county treasurers have become collectors of millions of dollars belonging to State funds and that any single defalcation may mean a very serious loss, the desirability of the State exercising the closest supervision of the administration of such funds is apparent. It is very gratifying to note that the annual reports of the court and trust fund examiners reveal a constant improvement in the management of these funds by the treasurers of the various counties throughout the State.

If any sum of money paid into court as a court and trust fund shall have remained in the hands of a county treasurer or the chamberlain of the city of New York for a period of twenty years or more, the law provides that it shall then be paid into the treasury of the State. During the fiscal year ending June 30, 1917, the amount of such funds transferred to the State Treasury was \$11,850.21.

FINANCE BUREAU

The duties of the State Comptroller originally were to draw warrants on the State Treasurer for State appropriations and salaries, and to make annual reports to the Legislature. These annual statements were merely those of receipts and disbursements with estimates of expenditures for the following year.

Because of the borrowing power of the Comptroller essential supply deficits, occurring whenever appropriations exceeded revenues, created the first State debt. This amounted to \$2,905,335 before it was paid off in 1826. But the legislative appropriations continued to be made without regard to the amount of the revenues, although the State's direct tax increased to nine and three-eighths mills before 1873, and considerable difficulty was experienced in collecting it.

During all these years it was frequently found necessary to resort to the sinking fund moneys to defray current expenses. By 1874 deficiencies to the amount of \$11,000,000 were found

in these funds requiring a constitutional amendment that year prohibiting such application.

For the last quarter of a century, however, the revenues from indirect sources, such as corporation, inheritance, excise, mortgages, stock transfer, motor vehicles and investment taxes have so increased as to frequently show an excess over expenditures.

INVESTMENT TAX BUREAU

Collections under the new Investment Tax Law, which became effective July 1, 1917, totaled approximately \$1,500,000 to November first. Recently the daily receipts from this tax amounted to over \$50,000, State Comptroller Travis reported.

Under the provisions of the new law, which replaces the Secured Debt Tax Statute, any holder of an investment security may pay to the State Comptroller a tax of twenty cents for every \$100, such tax exempting the property from all State and local taxes for the period in which the tax is paid, not to exceed five years.

LAND TAX BUREAU

Probably the one most important single source of revenue, during the early period of New York State's finances, was from the proceeds derived from the sale of its public lands. In the first years of government, approximately one-half of the State's entire income was secured in this way. In a single year, \$325,000 out of the total \$500,000 collected, came from this source, according to State Comptroller Travis' records.

The sale and management of our public domain, at the outset, however, was carried on in a neglectful way and much land was distributed where the State had no clear title of ownership. Because of the policy of disposing of its public lands, large tracts were secured by speculators who reaped immense profits in this way. Over 5,500,000 acres were sold for \$1,030,000, and of this vast area, 3,365,000 acres were purchased by one man at about four cents per acre.

Early in the State's history, about 500,000 acres of this vast territory were reserved for educational purposes. The plan was

to create a permanent fund out of the net proceeds collected from the sale of this land, although \$75,000 was lost shortly afterwards because of careless management. This resulted in turning over all remaining State land to form the nucleus of the common school fund and about 1,000,000 acres were set aside.

Until about thirty years ago, the State adhered to its early policy of disposing of its lands at low prices and unlimited acreage. The established plan was to retain only what was needed for public purposes. Since then, however, New York has adopted a new system by prohibiting the further sale of its public domain. The first step taken in acquiring more land was the floating of \$1,000,000 bond issue for Niagara State Reservation, followed shortly afterward by the first appropriation of \$25,000 for the Adirondack Park purchase.

The State's forest preserve now approximates nearly 2,000,000 acres, valued at about \$25,000,000. The regions are to be forever reserved for the free use of the people for their health and recreation. This domain has been found to be particularly essential to preserve the water and timber supply. The most recent acquisitions include the Palisades Interstate Park and the Harri-man gift of 10,000 acres. The State has also acquired a number of smaller parks and reservations of historical or scenic value.

The acquisition of the forest preserve raised the troublesome question of the taxation of State land by the locality. At first the State expressed its approval of the plan whereby its lands should be taxed just the same as a private individual. The result was that while the State's acreage increased 228 per centum, its taxes, during that same period, increased 510 per centum. This meant that the State's lands were assessed at a higher valuation than that of the resident owner.

Until recent years, it has been the policy to pay for the forest preserve out of the annual receipts. The noteworthy exceptions have been the short term bonds issued for the Niagara Reservation, the \$950,000 Adirondack Park issue, the \$2,500,000 for the Palisades Interstate Park and the recent \$10,000,000 issue. The unsoundness of including such expenditures, as current expenses,

is apparent. Such investments are for the benefit of the people for all time and should therefore be distributed over long periods of years.

MORTGAGE TAX BUREAU

The present Mortgage Tax Law, effective since 1906, imposes a recording tax of fifty cents for each \$100. The amount collected, less the expense of collection, is divided equally between the State and the localities in which the mortgaged premises are located. During the quarter ending September thirtieth last, State Comptroller Travis announced that the amount collected reached \$225,053.68. The State's share of the revenue derived from this source during the fiscal year ending June thirtieth amounted to \$1,171,217.33.

MUNICIPAL ACCOUNTS BUREAU

This bureau has twenty examiners and, to completely execute its purpose, needs as many more. The number of municipalities to be examined is 1,510, and it is required to formulate and install in each group uniform systems of accounting.

The work of installing such a system in the forty-seven cities of the third class is now nearing completion and a plan is being formulated and prepared for towns. It will require uniform procedure for recording the financial transactions of towns.

It is appreciated that town supervisors are seldom bookkeepers or accountants and that they are not permitted to employ accountants to keep their books. For that reason the plan being worked out will not require either bookkeeping or accounting knowledge in order that its operation be successful.

In the meantime the work of making examinations is being continued — in fact, pressed with more than usual vigor, and, at the same time, advice and suggestions respecting municipal administrative, accounting and financial problems are being supplied by correspondence.

In carrying out the provisions of the law relating to the examination of municipal accounts, the Comptroller's department is performing a duty which has a far-reaching effect in its benefits

[Vol. 14]

Comptroller

to the people throughout the State generally. It is one function of the Comptroller's office not directly connected with the affairs of the State, but rather extending to its political subdivisions.

The value of these examinations become more apparent each year and the assistance which is freely given to the officials of the several municipalities and the publicity which is given to the reports of the examinations as they have been made from time to time, have served to correct many of the improper practices which have existed. One of the beneficial effects of such examinations is the restoration to treasuries of municipalities examined of sums of money illegally or improperly withheld, but this is but a small measure of the benefits derived from examinations by this department.

STOCK TRANSFER TAX BUREAU

* STOCK TRANSFER TAX RECEIPTS

1917 *Fiscal Year Ending June 30, 1918*

July	\$521,486 04
August	396,832 24
September	447,171 56
†October	537,724 82
<hr/>	
Total for four months.....	\$1,903,214 66
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TRANSFER (INHERITANCE) TAX BUREAU

New York's inheritance (transfer) tax occupies a unique position in the science of State finance, especially as a revenue measure admirably adapted to replace the antiquated general property tax not often resorted to in recent years. Regarded solely as such, it is looked upon as payment for the benefits received, apportioned to the amount according to the ability of the taxpayer. The

* This revenue is derived from the tax imposing two cents on each hundred dollars on transfers of stock.

† Remitted to the treasury the following month.

Commonwealth may be said to be a silent partner in the business of every citizen without whose protection it would be impossible to accumulate wealth. When this partnership is dissolved by death, the silent partner becomes entitled to the share of the capital.

The progressive or graduated form of inheritance tax, now in use in New York and most States, is fixed in amount according to the degree of relationship between the parties. It is usually justified by the accidental-income features, which on the whole are the most satisfactory explanations of this form of revenue. Moreover, it is a useful method of getting at the ability of taxpayers and a less discouraging tax to them than an income or property tax, nor is it any more confiscatory. As a source of revenue, the inheritance tax in practice has been found to work well as it is difficult to evade, and at the same time yields large amounts of revenue without injurious results.

The New York tax was first imposed in 1885, but amendments of greater or less importance have been made at nearly every session of the Legislature since that time. The original act provided for a tax of five per centum on collateral inheritances, classing brothers and sisters with the exempt relatives. A complete revision of this law was made in 1905, although its main features were left undisturbed. But so successful has been this form of tax that State Comptroller Travis has repeatedly recommended making it a still more important source of revenue by increasing the rate on large estates. Last year he recommended a new basis for assessment which resulted in the enactment of a law that will increase the revenues \$3,000,000 annually, making the average amount about \$10,000,000.

MISCELLANEOUS

Recent statements to the effect that many of our State hospitals are in an overcrowded condition and that there exists a shortage of accommodations for hundreds of patients call attention to the work done by the State during the last quarter of a century when the insane became a charge upon the commonwealth.

[Vol. 14]

Comptroller

According to records in State Comptroller Travis' office, the State Commission in Lunacy was established in 1889 when there were six asylums maintained at an annual charge of \$1,600,000. There are now thirteen State hospitals equipped at \$28,000,000 to care for approximately 38,000 patients at an annual expense of about \$11,000,000 — the largest item of the general fund expenditures..

The Constitution requires that all such institutions, whether public or private, be visited and inspected by the State. Since 1896, a salary classification board has attended to the principal items of expenditure. Considerable saving has been effected by the Audit Bureau of the State Comptroller's office in connection with the purchasing of provisions, stores and fuel for these institutions.

Nowhere in the world is greater attention given to safe-guarding the health of the citizens than in New York State, nor is there any other Commonwealth where laws of sanitation are more strictly enforced than here. How this State became the first to assume regulation and charge over the health of its inhabitants may be interesting to relate, in view of special wartime precautions recently adopted.

Measures for the protection of the public health in this State were at first taken primarily for the purpose of preventing the introduction of disease from foreign countries. They took the form of the establishment of quarantine against vessels coming from ports at which contagious diseases were prevalent. On this account, public health administration developed first in New York city where the important seaport was located.

Until the creation of the State Board of Health, the chief expenditures incurred by the State, according to State Comptroller Travis' records, were for hospital work in New York city and for quarantine purposes in connection with the regulations of shipping in the port of New York, the sum first expended by the State being \$5,000, and later increased to \$22,500. Last year the State appropriated \$644,130 for the work of the State Health Department.

STATE INDUSTRIAL COMMISSION

In the Matter of the Claim of FRANK H. CUTTER, for Compensation under the Workmen's Compensation Law, against C. T. SNAVLIN, Employer; UNITED STATES CASUALTY COMPANY, Insurance Carrier

Case No. 2997

(Decided April 11, 1917)

Injuries sustained by Frank H. Cutter while employed as a "handy man" by C. T. Snavlin, at Syracuse, N. Y.

On July 29, 1916, the claimant, Frank H. Cutter, was doing plumbing work in connecting up a boiler in a building owned by his employer, C. T. Snavlin, who was engaged in the business of buying, repairing and selling real property. While so employed the claimant fell down a stairway and sustained severe injuries to his right elbow. Uncorroborated evidence as to accident discussed. The case involves several close questions. *Held*, that it came within the Compensation Law as claimant was not a contractor but an employee; that even if claimant had an incipient boil where injured, the accident, if it accentuated it and caused infection, was within the law. Request for review denied.

This case was heard by Deputy Commissioner Richards, who decided that the claimant is entitled to compensation. The insurance carrier has asked to have this decision reviewed by the Commission.

Frank H. Cutter claims compensation for injuries received by him on the 29th day of July, 1916, growing out of an accident by which he claims to have fallen downstairs and injured his right elbow. The claimant is a handy man able to do many kinds of repair work, and on the day in question was engaged in doing some plumbing work in the way of connecting up a boiler for his employer in the city of Syracuse. The employer is said to be a real estate man, but carries on a very extensive business in buying up real estate with buildings upon it which have fallen into disrepair, repairing them so as to put them in good condition for sale

[Vol. 14]

State Industrial Commission

and then selling them off or renting them, as the case may be. The testimony shows that within the last few years Mr. Snavlin has thus bought and rebuilt or repaired many buildings in the city of Syracuse, running anywhere from twenty to fifty, as I read the record. He states that he finds it more to his interests to furnish his own material and hire men to do the work, instead of having it done by contract, and that he at times keeps a good many men at work, both carpenters, paperhangers and others. The claimant states that he was to receive thirty cents per hour for his wages, and while Mr. Snavlin seems to be of the opinion that his compensation was rather to be a lump sum for work which he did, it is still true that of the many instances where Mr. Snavlin states that he paid the claimant, the rate always works out at thirty cents per hour. Not only did Mr. Snavlin furnish the material for these repairs, but the testimony is that he furnished the tools with which Cutter worked, or at least a portion of them. The claimant's witnesses state that he fell down the cellar stairs on the twenty-ninth of July, that he received treatment at home for some days, and that he finally consulted a physician on the seventh day of August following. The physician who treated him on August seventh states that Cutter told him that he had fallen down the stairs and hurt his arm on the twenty-ninth of July, and that he, the physician, found a very much inflamed elbow which was discharging pus. There is evidence that the claimant received a severe injury a couple of years before by cranking an automobile by which this arm was rather severely hurt, causing a partial anklyosis of the elbow. There is testimony from witnesses for the employer to the effect that Mr. Cutter, before he received his injury, had an inflamed spot on his elbow, which one of the witnesses thought looked like a boil. She says she advised him to poultice it and on asking Cutter why his employer sent such a man to do the work, that Cutter said he could use his arm well enough for this work. The employer and insurance carrier contest the claim on the ground that there is no sufficient proof that an accident happened, that the disability is the result of infection resulting from a boil and had no connection with an accident, and that in any event the

claimant is not covered by the Compensation Law, because under the rulings of the Commission and of the courts, the work in which he was engaged was not carried on by the employer for pecuniary gain.

Clifford Searl, for claimant.

W. H. Harding, for insurance carrier.

LYON, Commissioner.—The insurance carrier claims that the case is not covered by the Compensation Law. He cites the opinion of the court in the cases of *Bargey v. Massaro Macaroni Company*, *Mihm v. Hussey* and *Coleman v. Bartholomew*. The accident in the present case is alleged to have occurred since the 1st of June, 1916, at which time the amendment to the Compensation Law went into effect, which the Commission has held largely did away with the effect of the decision of the court in the *Bargey* case. The recent amendment makes the work which the injured man was doing, in certain cases, the test of his right to compensation. Thus subdivision 4 of section 3 defines an employee, among other things, as "a person engaged in one of the occupations enumerated in section 2." There is no doubt but that the claimant here was engaged in one of the occupations enumerated in section 2 at the time of his accident. The insurance carrier further claims that under the decision of *Coleman v. Bartholomew* it must be held that the employer was not carrying on a business for pecuniary gain. I do not think this decision is controlling in the present case. *Bartholomew* was a lawyer who also had a farm which he managed. *Coleman* was injured while repairing the roof to the barn. The court held that repairing the roof to the barn was incident to farm labor and so was excluded from the statute, and further, that repairing the barn for a farmer was not work carried on by an employer for pecuniary gain. In the present case a man while calling himself a real estate dealer, makes a regular business of buying dilapidated houses and buildings, thoroughly repairing and remodeling and selling them at a profit. This business is very

extensive and he keeps from time to time many men employed in putting these houses into condition to rent and sell. I think it must be held, as in the case of *Sickles v. Ballston Springs Refrigerating Company*, that for the purposes of this case, Mr. Snavlin had two lines of business, one dealing in real estate proper and the other rebuilding and repairing houses as a vocation, and that inasmuch as Mr. Cutter was injured in that portion of Mr. Snavlin's business which is deemed hazardous under the Compensation Law and was carried on for pecuniary gain, the case comes under the act and is covered by the policy of insurance issued to the employer.

The insurance carrier further questions the finding that an accident happened to the claimant, and also the finding that if an accident happened his present disability is due to such accident. The carrier very rightly asserts that inasmuch as the finding of an accident depends upon claimant's uncorroborated testimony, that testimony must be scrutinized with great care. It is perfectly true that a trier of the facts may wholly disbelieve an interested witness and find against his positive testimony, but it is also true that an interested witness may be, and if the surrounding circumstances make it proper, should be, believed. The testimony from Mr. Cutter is that he slipped on the stair and fell, striking his elbow and shoulder. His wife corroborates him to the extent of saying that on the same day he came home and reported such an accident to her and that she put liniment on the elbow and otherwise treated him. Dr. Burns, to whom he went a week later for treatment, says that the claimant then told him of the accident. There is nothing improbable in the story and the fact that the claimant immediately told of the accident and has been consistent in his statements, coupled with the fact of the serious condition of his elbow, to my mind makes the Deputy's finding of accident perfectly proper, especially since there is no disproof offered except statements of two people who were in the house, that they did not hear him fall, but even this testimony is greatly weakened by the fact that Mrs. Paddock, the witness, testified that she was on the second floor when Mr. Cutter is said to have fallen in the cellar.

As to the question of the relation of the accident to the present disability of the claimant, there is this to be said: The two witnesses who saw the elbow before the accident say that it looked as though the bones were going to protrude, and they spoke of the condition as a boil, but a casual glance at an elbow of this kind is scarcely sufficient to make a finding that it is the result of a boil, especially in view of the statement of Dr. Burns, that in his opinion the serious condition which he now finds, or which he found one week later, was not due to a boil. Even if the claimant had a boil upon his elbow in an incipient stage and the fall, striking the elbow, accentuated it or drove the poison into the blood stream, it would still make a compensatable case, under the recent ruling of the Commission in the matter of *Caine v. Greenhut*.

The questions involved in the case are close and warranted very careful examination on the part of the insurance carrier, but I am of the opinion, after reviewing all the testimony, hearing argument and reading the brief of the insurance carrier, that the decision of our Deputy awarding compensation is sustained by the evidence and should be affirmed.

On the 11th day of April, 1917, the Commission acted upon the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of ANNA FRIEDMAN, Daughter, for Compensation under the Workmen's Compensation Law, for the Death of ABRAHAM FRIEDMAN, against R. & F. REALTY CORPORATION, Employer; ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE CORPORATION, Insurance Carrier

Death File No. 823

(Decided May 14, 1917)

Injuries resulting in the death of Abraham Friedman while employed by the R. & F. Realty Corporation as a watchman in the borough of Brooklyn, New York city.

Anna Friedman, daughter of deceased, brings this claim in behalf of herself and of her mother and five brothers, all of whom reside in Russia. The brothers are all under eighteen years of age.

[Vol. 14]

State Industrial Commission

Decedent's death was the result of blood poison following the amputation of an infected little toe and thereafter of a leg. Whether an ingrowing toe nail caused the infection contested. *Held*, that the failure to duly notify employer of the alleged accident under the circumstances of this case barred award.

This is a claim by Anna Friedman, daughter of Abraham Friedman, deceased, on behalf of herself and also on behalf of her mother, Kune Friedman, the widow, and five brothers, all children of the deceased and under the age of eighteen years. The mother and five children are residents of Russia, Anna alone being in this country.

Abraham Friedman was employed by the R. & F. Realty Corporation in the borough of Brooklyn, New York city, as a watchman on a building being erected for the said company. On February 25, 1916, said Abraham Friedman died from blood poisoning following the amputation first of the toe of his right foot and later of his leg. These amputations were necessitated by reason of an infected little toe. It is claimed that a brick fell and struck the deceased on this toe on or about January 2, 1916, and that the infection resulted from the wound caused by such striking by a brick. It is claimed that the deceased told his daughter on the evening of January 2, 1916, that he had received such an accident and showed her where the toe was "all smashed and blue." The doctor who was called to treat it two days later describes it as a slight abrasion, and that there was a slight break of the upper skin or epidermis.

Deceased returned to work until the following Tuesday, January 4, 1916, on which day a friend took him home in his wagon from the shanty on the job where he worked, and a doctor was at the same time called to treat him. On January fourteenth deceased was removed to the hospital and on February twenty-fifth he died. The death certificate signed by the coroner's physician gives the cause of death as "Gangrene—right leg—brick fell on foot."

No one witnessed any accident, but the daughter and the physician, both of whom may be said to be interested parties, testify that deceased described the accident as above set forth.

There is no evidence that the deceased gave any notice of injury to his employer, but on or about February 16, 1916, more than thirty days after the disability occurred, one Benjamin F. Maged, an attorney representing the deceased, wrote a letter to the R. & F. Realty Corporation stating that Abraham Friedman had placed in his hands for collection a claim "for personal injuries sustained by him on or about January 2d, 1916, at your premises on Fortieth street and Thirteenth avenue, Brooklyn," and saying he expected to hear from the company within the next few days. This letter was answered on March sixth by John J. Bakerman, an attorney, acting for the R. & F. Realty Corporation, who transmitted with his letter "blanks for report under the Compensation Law." The letter also states that outside of the attorney's letter, the company has no knowledge of any accident and "cannot even make a report in the matter."

The attorney's notice to the employer was dated several days before the employee's death; the acknowledgment of it was dated nearly two weeks after his death. There is no evidence of any notice of death being given to the employer, although he must have learned of it, for on March eleventh a notice of injury was filed with the Commission by the R. & F. Realty Corporation, signed by one Schumer, as president. In this notice the fact is noted of the employee's death, but in answer to the questions as to how accident happened and whether employee was injured in course of employment, the employer states that he does not know.

The business of the R. & F. Realty Corporation was the erection of a tenement house. The work was being done by contractors and the deceased seems to have been the only employee of this company on that job.

At about the time of the alleged accident the R. & F. Realty Corporation became involved in financial difficulties with the result that the two owners of the company, one Rhein and one Finkelstein, were compelled to relinquish the business and turned the company over to the owner of the mortgage, who was Schumer, the person who signed the notice of injury subsequently filed with the Commission. As nearly as it can be established Schumer's connection with the company began on January twenty-fifth, one

month before the death of the employee, and three weeks after the accident.

SAYER, Commissioner.— This claim is resisted on three main grounds, *first*, that the employment was not covered by the law; *second*, that the employer is prejudiced by the failure to give notice of the injury and death; and *third*, that the accident has not been established by competent evidence.

Without going into the question as to whether or not the business of the employer was covered by the law, I will proceed to a consideration of the other two points raised by the insurance carrier. These points call for a serious consideration.

The Court of Appeals has held in the Carroll case (*Carroll v. Knickerbocker*, 218 N. Y. 435) that an accidental injury cannot be established solely by hearsay evidence. We have here hearsay evidence, and in addition an injured toe. The nature of the injury, however, is not such as to clearly spell out an accident. The physician who treated him testified that it might have come from the pinch of a tight shoe or a wrinkle in the leather of a heavy shoe, such as this class of workmen customarily wear. He also testified that it might have come from stubbing his toe.

In view of the difficulty of ascertaining the facts as to such an accident, it becomes all the more necessary that the employer should have had notice within the time fixed in the statute. There is hearsay evidence to the effect that on one occasion deceased told of having stepped on a rusty nail, and it appears that about a month or six weeks from the accident here alleged, deceased had a bad ingrowing toe nail, which was surgically treated by Dr. Katzen, who later treated him for the injury which is the basis of this claim. An attempt is made to prove by the testimony of Rhein and Finkelstein that they had knowledge of the injury. They are very hazy as to time and as to whether they knew of this injury or whether the injury of which they knew was the ingrowing nail or the stepping on a rusty nail. They deny hearing of a brick or stone falling on deceased's foot. Moreover, at this time they were in financial trouble, had lost interest in the building and were preparing to turn the company over to

Schumer, who so far as the record discloses, had no knowledge of the deceased or his accident. The insurance company sought to locate a police officer, who was said to have found deceased groaning in the shanty at one time, and to have had some conversation with him. This officer could not be brought before us on the hearing, for the reason that he had retired from the police force and returned to Ireland. Evidence was offered by the insurance company to the effect that when interviewed in about April, 1916, the officer said he found the deceased in the shanty on the work and suffering from his foot, and that deceased told him it was from an ingrowing toe nail.

Under all the circumstances the Commission is not warranted in excusing the failure to give the required notice and the claim must be denied.

On the 14th day of May, 1917, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of ENI HUDEC, Widow, for Compensation under the Workmen's Compensation Law, for the Death of WENDELIN HUDEC, against GEORGE G. WILSON & Co., INC., Employer; GLOBE INDEMNITY COMPANY, Insurance Carrier

Case No. 17604

In the Matter of the Claim of FRANK CHARVAT, for Compensation under the Workmen's Compensation Law, against GEORGE G. WILSON & Co., INC., Employer; GLOBE INDEMNITY COMPANY, Insurance Carrier

Case No. 6989

In the Matter of the Claim of CHARLES DIVOTS, for Compensation under the Workmen's Compensation Law, against GEORGE G. WILSON & Co., INC., Employer; GLOBE INDEMNITY COMPANY, Insurance Carrier

Case No. 8067

[Vol. 14]

State Industrial Commission

In the Matter of the Claim of FRANK DVOREK, for Compensation under the Workmen's Compensation Law, against GEORGE G. WILSON & Co., INC., Employer; GLOBE INDEMNITY COMPANY, Insurance Carrier

Case No. 8099

(Decided May 14, 1917)

Damages caused by the collapse of a building at Sixty-fourth street and Third avenue, borough of Manhattan, New York city, resulting in the death of Hudec and personal injuries to Charvat, Divots and Dvorek, while all were employed by George G. Wilson & Co., Inc.

The cases herein are considered together as they all resulted from the same happening. It is admitted that death benefits in the Hudec case and compensation in the other cases should be granted, the only question involved being as to who was the employer of these men when the accident occurred. Upon an exhaustive consideration of the facts in the several cases, *held*, that awards should be made in all of them.

These are cases growing out of an accident on the 23d day of November, 1916. The claim of Eni Hudec is made on behalf of herself and minor children for the death of her husband, Wendelin Hudec. All of the others are for compensation growing out of injuries. The claims all arose out of the collapse of the roof of a garage on the southeast corner of Sixty-fourth street and Third avenue, which was in course of construction. Wilson & Co. were the general contractors for the erection of the garage, and one John Vorchok, doing business under the name of Empire Fireproofing Concrete Construction Company, had a sub-contract to do the reinforced concrete work. There is no question but that death benefits are due in the Hudec case and compensation in the other three cases, the only question being, who was the employer of these injured workmen on the date of the accident. There is little or no dispute about the facts of the case.

Mr. Murray, for insurance carrier.

LYON, Commissioner.—There seems to be no question but that Hudec and the three injured workmen were originally hired and

paid by the sub-contractor, Vorchok. The undisputed testimony, however, is that some three or four weeks before the accident occurred, Vorchok fell into financial difficulties and was unable, unassisted, to carry on his contract for the reinforced concrete. His contract with the Wilson Company was what is known as the uniform contract prepared by architects and contained the usual clause that if the one party to the contract at any time found that Vorchok could not properly and successfully carry the same out, the other party to the contract might, on giving the proper written notice, consider the contract as at an end and himself do the work under it, rendering to Vorchok at the end, however, any surplus which might be due him beyond the expense of carrying the contract out, and holding Vorchok for any excessive payment necessary to be made beyond the terms of the contract. No written notice of desire to do this, however, was served on behalf of Wilson & Co., but instead there was an oral arrangement, acquiesced in by both, that Wilson would take up the reinforced concrete and complete the contract. I say this was the understanding, although Mr. Wilson testified that he merely agreed to guarantee the payment to Vorchok's men, but the testimony is that Vorchok from that time forth ceased to have any superintendence over the job, except that he visited the place of work from time to time and apparently O. K.'d payrolls, but this in my opinion was only for the purpose of having a proper check upon the payments made by Wilson, in order to make the final settlement, pursuant to the contract. Mr. Wilson admits that he not only took over such men as Vorchok had on the job, but that he hired other men and that he had the absolute control over them and the right, if their work did not prove satisfactory, to discharge them.

There is some question raised whether Wilson intended to cover Vorchok's men by compensation insurance, but this question does not seem to be very material, because the insurance contract calls for coverage of all of Wilson's men. If the payroll audit of Wilson's men has not disclosed the fact that these men taken over from Vorchok were on his payroll, a future audit will undoubtedly be made so that the insurance carrier will be com-

[Vol. 14]

State Industrial Commission

pletely covered, so far as the premium is concerned for this risk, and no doubt the added expense to Wilson for carrying insurance on the men doing the reinforced concrete, will be credited to him on his final settlement with Vorchok.

I am very clearly of the opinion that under the arrangement in force between Vorchok and Wilson at the time of the accident Wilson & Co. was the employer of Hudec and these other injured workmen, and I, therefore, advise that an award be made against Wilson & Co. and the Globe Indemnity Company in all of the cases.

On the 14th day of May, 1917, the Commission acted upon the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of EVA POTTER REMINGTON, Mother, for Compensation under the Workmen's Compensation Law, for the Death of FREDERICK REMINGTON, against BRIGGS BROS. & Co., Employer; LONDON AND LANCASHIRE INDEMNITY COMPANY OF AMERICA, Insurance Carrier

File No. A 12071

(Decided May 14, 1917)

Injuries resulting in the death of Frederick Remington while operating an automobile used by him in the course of his employment near Batavia, N. Y.

On October 8, 1916, Frederick Remington, while employed as a collector and salesman by Briggs Bros. & Co., a corporation engaged in the seed business, was returning from one of his business trips in a car belonging to the employer and used by deceased under orders in order to more quickly cover his route. At the time of the accident one Attridge, an assistant of deceased, was driving, but near Batavia, N. Y., the car overtook a drunken person on the road and deceased seized the wheel and ditched the car in order to avoid running down the intoxicated pedestrian. The car overturned and Remington was killed. From the award made in this case by Deputy Commissioner Phillips the present appeal was taken by the insurance carrier, the questions arising for review being whether the deceased came under the Compensation Law and as to whether his mother was dependent upon him at the time of his death. *Held*, that the case should not be reopened but that the award should be confirmed.

In this case an award was made by Deputy Commissioner Phillips on February 7, 1917, to the mother of Frederick Remington, who was killed while traveling in an automobile on October 8, 1916. From this award an appeal has been taken by the insurance carrier, and the matter comes before us to review the evidence and to determine, *first*, whether the case shall be reopened; *second*, whether the employment of the deceased came under the Workmen's Compensation Law; and *third*, whether the claimant, the mother of the deceased, was dependent upon him at the time of his death.

SAYER, Commissioner.—I am satisfied from a review of the evidence in the record that the deceased was killed by reason of an accident growing out of and in the course of his employment in a hazardous employment as defined in the Workmen's Compensation Law, and that, therefore, the case is one within that law. The employer was a company engaged in distributing and selling seeds. Deceased was employed as a "collector and salesman" (see employer's notice of injury). It appears from the testimony of the president of the company that deceased was furnished by the employer with an automobile in order that he might cover the territory in which he was to operate more quickly than would otherwise be the case. He made one trip out in the auto and on the second trip out an arrangement was made whereby he was to take with him another man, one Attridge, who was to assist in working the various towns they visited as the season was drawing to a close and haste was necessary. The deceased customarily drove the car, according to Attridge, but just prior to the accident Attridge was driving. While returning along the road near Batavia, N. Y., in order to avoid a collision with a drunken person on the road, deceased seized the steering wheel, the machine went off the road and overturned. Unquestionably a part of the duties of the deceased was the operation of a vehicle. He had been operating it on the morning of the accident, and although he had not been steering it immediately prior to the accident he was riding in it and his acts evidence responsibility

for its operation, for at the critical moment he seized the wheel and steered off the road in preference to running down a man on the road.

As to the dependency of the mother, it appears that the mother had for many years taught school and had supported the deceased through school and college. He had been employed upon this employment for about three months, had sent his mother a check for fifty dollars for herself and was on his way home from a successful trip when killed. He had repeatedly stated that all that was his was his mother's and that he would take care of her. She had arrived at an age when it was necessary for her to retire from teaching school, and after her years of toil and privation she had reached a time when she had a right to expect her sons, whom she had reared and educated, to maintain her. There is evidence that I think we must believe that the deceased was a man of ability, that he had received offers of better employment, one of which he expected to accept after his return from this trip, and that his mother was deprived of a very substantial support that she had a right to look to in her later years.

Our attention is directed to the case of *Tirre v. Bush Terminal Co.*, 172 App. Div. 386, but that case is not in point here. In that case there was a paucity of evidence and the evidence of payments to a parent residing in a foreign country was almost wholly hearsay. In this case the mother testifies directly that she received support, that the fifty dollars given her was by way of support out of the first earnings of her son, and there is every reason to believe that they would have continued. The finding of the Commission, when founded on evidence, is final and conclusive. *Rhyner v. Hueber Building Co.*, 171 App. Div. 56.

The evidence in the case is to my mind convincing and the decision of the Deputy Commissioner was sound. No new evidence is offered and the evidence in the record is sufficient to sustain the findings. Accordingly it follows that the case should not be reopened and the award should be in all respects confirmed.

On the 14th day of May, 1917, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of ROSIE GANDY, Widow, for Compensation under the Workmen's Compensation Law, for the Death of FRANK GANDY, against BASS HOLDING COMPANY, Employer; COMMERCIAL CASUALTY COMPANY, Insurance Carrier

Case No. 11820

(Decided June 6, 1917)

Injuries received by Frank Gandy, resulting in his death, while employed as a janitor and handy man by Bass Holding Co. in the borough of Manhattan, city of New York.

The claim herein was brought by the widow of Frank Gandy, who was employed at the time of his death on September 30, 1916, as a janitor and handy man in the apartment house at No. 1324 Lexington avenue in the borough of Manhattan, in which building he and his wife had a flat. While on his way to the basement of the premises for the purpose of looking after the hot water plant he was last seen alive by his wife, but was afterward found unconscious at the foot of the stairway. No one saw the accident, but the medical proof was that Gandy was found with a fractured skull. The contention was made that he was not in the employ of the company at the time of the accident. From the evidence, however, that he was passing from one place to another on the company's property for the purpose of repair work, he was obviously in its employ and within the statute. Award granted on basis of the wage earning capacity of deceased to the extent of twenty dollars per month, which is held to be a fair value for the work performed by him for the company.

This is a claim made by the widow of Frank Gandy, for herself and minor child for compensation, growing out of the death of Frank Gandy, following an accident on September 30, 1916. Mr. Gandy was a carpenter or cabinet maker and was employed during the day time at his trade. Deceased and wife, the claimant, had a flat at No. 1324 Lexington avenue, in the borough of Manhattan, in the building of which they were the janitors. The building was a large flat house occupied by many families and the Gandy family were allowed the use of an apartment, with free light and heat and were paid twenty dollars per month, for

caring for the house. When the weather was cold enough to require steam heat, the pay was twenty-five dollars per month. The heating apparatus in the house was in the basement; the Gandys occupied a flat on the first floor. On the day of the accident Mrs. Gandy had been shopping in the neighborhood and as she returned she met her husband in the hallway, who stated to her that he was going down to attend to the hot water. He went out of a door in the rear of the premises from which a flight of stairs led to the area-way in the rear of the house. His wife heard him call immediately after he stepped out of the door, and on going to the rear of the house saw him lying on the stone pavement below the stairway. Help was summoned and a doctor called. He was removed into the basement of the building and from there to the hospital, where he died without ever regaining consciousness. The insurance carrier resists the payment of compensation on the ground that there is no proof of an accident, that he was not an employee of the Bass Holding Company, the owner of the house, and that in any event his accident did not arise out of and in the course of his employment if he were such an employee.

Albert Hlavac, Jr., for claimant,

John Purdon and Dr. S. M. Lindebaum, for insurance carrier.

LYON, Commissioner.—I think it has been shown that deceased was an employee of the Bass Holding Company within the meaning of the Compensation Law. It is true that Mrs. Gandy was perhaps primarily the janitress of the house in which they lived, and it may be that as matter of fact the money which was turned over for the work in part payment for janitor service was handed to her and not to her husband, but the undisputed evidence is that the deceased was handy about the repairs to the house and to the plumbing and heating apparatus, that he undoubtedly attended to the repairs at morning and night when repairs were needed and that the rather extraordinary payment for janitor service of twenty or twenty-five dollars per month, in addition to free rent, light and heat, was in payment for the ordinary janitor service

and for his service as handy man and repairer. It seems that the use of a flat in this house with light and heat is of the reasonable value of at least twenty dollars and I think it must be found that the Gandys, husband and wife, received for their services in and about the premises at least forty dollars per month, of which one-half, or twenty dollars per month, was the reasonable value of services of the deceased. I think also that Mr. Gandy's death has been traced with reasonable certainty to the accident. The doctor who first reached him after his fall diagnosed his case as "fractured skull" and such was the report of the employer. There is no evidence in the case whatever that Mr. Gandy was suffering from any heart trouble or other disease which would produce vertigo and cause his fall; he was apparently in the best of health. His body was found at a place where it would naturally be if he fell from the balustrade of the outside stairs, and his calling to his wife at the time he fell, all coupled with the finding of a fractured skull, seems to me to leave no other conclusion to be drawn, if we are to give effect to the natural inferences, than that his fall was accidental. In this respect the case is to be distinguished from the case of *Collins v. Brooklyn Union Gas Company*, where the injured man fell on a level street and the medical attendant's report showed that his fall was caused by heart syncope. In that case the court held that there was no proof of an accident, but that is certainly quite far removed from the case where a man without any evidence of an illness is found unconscious with a broken skull at the bottom of a stairway down which he had attempted to pass after dark and without any light.

A more serious question arises as to whether the accident arose out of and in the course of Mr. Gandy's employment, but I think this also must be found in favor of the claimant. Mrs. Gandy testified distinctly that her husband just before his fall had with him the usual tools with which he repaired the premises, and a disinterested witness was called who said she saw such tools protruding from his pocket a moment before his fall. It is also undisputed that he stated that he was going to the cellar to look after the hot water. It therefore seems that Mr. Gandy's accident

occurred while he was passing, on his employer's plant, from one place to another for the purpose of repairing the heating apparatus.

The attorney for the insurance carrier relies upon the case of *Gleisner v. Gross*, 170 App. Div. 37; that was a case of a man who, like the deceased in this case, in the care of a building, made repairs to plumbing, painting and carpentry work and other kindred matters and was going to a roof for the purpose of putting out a flag and was injured while so doing. The court held that the findings were not definite enough to show that his accident arose out of and in the course of his employment as a repairer of plumbing, painting and carpentry work. The present case is further to be distinguished from the *Gleisner* case in that the deceased here was on his way to do the work which is enumerated in the statute as hazardous, while in the *Gleisner* case he was injured on the way to do the work which the statute does not cover. It seems that in the *Gleisner* case if Mr. Gleisner had been on his way to repair plumbing or carpentry work, which is covered by the act, instead of being on the way to perform a service which is not covered by the act, he would have been protected by the employer's insurance; for the courts have held that an employee engaged in hazardous employment is covered by the act not only while actually doing the hazardous thing, but while he is doing anything that is incidental to a hazardous employment. If this be so, it seems that while Mr. Gandy was passing from the first floor to the basement for the specific purpose of attending to the heating apparatus, he was covered by the act, that specific thing being among the hazards enumerated under section 2 of the act.

I therefore advise that an award be made on the basis of the wage earning capacity of Mr. Gandy to the extent of twenty dollars per month, which is a fair value as shown by the evidence of the work performed by him for the Bass Holding Company.

On the 6th day of June, 1917, the Commission acted upon the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of LOTTIE COONS, Widow, for Compensation under the Workmen's Compensation Law, for the Death of BERNARD COONS, against ENDICOTT JOHNSON & COMPANY, Employer; EMPLOYERS' LIABILITY ASSURANCE CORPORATION, Insurance Carrier

Death File No. 18665

(Decided June 6, 1917)

Injuries received by Bernard Coons, resulting in his death, while employed by Endicott Johnson & Co., shoe manufacturers.

Bernard Coons on or about January 1, 1916, while employed by Endicott Johnson & Co., a corporation engaged in the manufacture of shoes, and while in the operation of shaping a shoe by placing it upon what is known in the trade as a tree, sustained an inguinal hernia due to the exertion which he was compelled to use in order to force the incompleated shoe upon the tree. In June following he was sent to a hospital and was operated on for the hernia. Pneumonia developed and his death resulted. *Held*, that even if the hernia had been congenital the strain of the accident necessitated an operation and was the cause of the pneumonia of which he died. An award was made.

Compensation is claimed by the widow of Bernard Coons on behalf of herself and minor children for death benefits arising out of his death on June twenty-first, following an accident, as it is claimed, on or about January 1, 1916. The employer is a manufacturer of shoes and the deceased was one of its workmen. One of the processes of shoe making is to place the incompleated shoe upon a tree, for the purpose of giving it the proper form. This is called shoe-treering. When the leather is soft and pliable the work is performed apparently without much exertion, but in case of heavy shoes made of stiffer and more inelastic material, the work necessitates the use of more or less force. The deceased was a man in ordinary health, and in the early part of January, 1916, while at his work treering shoes, complained of a severe pain in his side. He made known his suffering to several of his co-employees and stated that he could no longer continue at work, and another employee took up the rack of shoe tops upon which

[Vol. 14]

State Industrial Commission

the deceased was working and finished it for him. On reaching his home he explained his injury to his wife, but did not consult a doctor for about two months, when he stated to the doctor that he had injured himself about two months previously. He resumed work with more or less regularity, and finally after an examination on the sixteenth of June, went to a hospital for an operation and was operated on for an inguinal hernia. Pneumonia developed within the next two or three days and he died of pneumonia on the twenty-first day of June. The insurance carrier resists the payment of the claim on the ground that there is no competent proof to show that the accident was the cause of the pneumonia, and it also resists the claim on the general theory that hernias, of this description at least, are caused not by any specific accident, but by continued impulses or strains which men undergo in the course of their employment.

Claimant in person.

W. L. Tufts, for insurance carrier.

LYON, Commissioner.—It seems to be the consensus of medical opinion that pneumonia may and often does develop directly from surgical operations. Apparently the pneumonia germ finds a freer scope for its operation when the person is weakened and debilitated from the shock of an operation. Such pneumonia is usually referred to as post-operative or post-traumatic pneumonia. Inasmuch as the pneumonia in the present case followed the operation almost immediately and resulted in death within the space of a couple of days, I think we must agree with the medical authorities that the death of Mr. Coons was directly due to the operation.

A much more difficult situation is presented, however, over the question whether the deceased met with an accident within the meaning of the Compensation Law. That there are instances of traumatic hernia caused by excessive strain in industry is too well established by our decisions and the decisions of the court to admit of controversy. Just how severe a strain must be under-

gone by an individual to cause a traumatic hernia, however, is difficult to determine. It is true that in this case there is no direct proof of any injury at all, except from the statements made by the deceased himself, but this would necessarily be so because the work in which the deceased was employed was not such as would give outward evidence of a severe strain, and if a hernia were caused by the strain of treeing shoes, it would necessarily have to be proven by the statement of the injured man himself, since no one else could state whether he in fact received a strain and was undergoing pain. In the present case the evidence is that he immediately told several of his co-employees. The proof is that he suffered intense pain for at least half an hour, that he gave up his employment for the day and turned it over to another man and that he immediately told his wife of his difficulty. On consulting a physician a couple of months later, he stated to the physician that he had strained himself two months previously, and I think this testimony, although it is altogether hearsay, being corroborated by the fact of a hernia necessitating an operation and by all the circumstances of the case is sufficient to warrant a finding that the deceased did receive the strain of which he complained in the early part of January, 1916. I think from the evidence in the case it must be found that Mr. Coons either had an incipient hernia prior to January, 1916, or at least had such congenital defect that he was easily subject to this sort of injury, but I think the fact of his having a final strain sufficient to cause him intense pain must be held to have caused the intestine to protrude through the abdominal ring. I do not see, therefore, that the case is particularly different from other cases decided by the Commission, in which a man predisposed to disease or even suffering from it, is perhaps in ignorance of his disease, or at all events finds his disease not disabling until an accident accelerates it and causes disability. I, therefore, advise that an award be made.

On the 6th day of June, 1917, the Commission acted upon the foregoing matter in accordance with the foregoing opinion.

[Vol. 14]

State Industrial Commission

In the Matter of the Claim of ERMELINDA TUCILLO, Widow, for Compensation under the Workmen's Compensation Law, for the Death of JOHN TUCILLO, against WARD BAKING COMPANY, Employer; OCEAN ACCIDENT AND GUARANTEE COMPANY, Insurance Carrier

Death File No. 35154

(Decided June 6, 1917)

Injuries received by John Tucillo, resulting in his death, while employed by the Ward Baking Company.

On February 28, 1916, the deceased, who was the husband of the claimant herein, Ermelinda Tucillo, was injured while in the employment of the Ward Baking Company. The deceased developed a right inguinal hernia and an operation was performed from which the patient made a fair recovery, and was able to be about for a few days. On April twenty-first, three weeks after the operation, he was again confined to his bed and died April twenty-sixth. The only question herein is as to whether the death can be traced with reasonable certainty to the injury. It was shown that the deceased had a heart trouble before the operation and that the operation left him weak and unable to work. *Held*, that the injury and the operation had hastened his previous diseased condition to a fatal close. An award was made.

Claim is made by Ermelinda Tucillo, the widow of Jenaro (John) Tucillo, on behalf of herself and minor children, for death benefits growing out of the death of the said John Tucillo on April 26, 1916, in consequence, as it is claimed, of an injury on February 28, 1916. The deceased received an injury on February twenty-eighth which resulted in a bubonocoele, or a light case of right inguinal hernia. It seems there can be no question about this, because the deceased and the employer entered into an agreement on April 10, 1916, for compensation. He was examined by a Dr. McGlade immediately after his injury, who found a very serious condition of his heart which, in his opinion, should have prevented an operation. At the latter end of March he went to the physician of the Ward Baking Company, a Dr. Fisher, who made an examination of him and recommended an operation for the hernia. Dr. Fisher made an examination for the

purpose of finding out whether there were heart lesions which should prevent an operation, as did also Dr. Steele, the anaesthetist. Neither of these physicians found any heart trouble sufficient to prevent the operation. An operation was thereupon performed, from which the patient made a fair recovery, the wound having healed by primary intention and the patient was able to be about, although in a very weak condition. By the twenty-first of April, which was about three weeks after the operation, he was in such condition that he had to take to his bed again and he died, as already stated, on April twenty-sixth. The question to be determined is whether the death can be traced with reasonable certainty to the injury.

Claimant in person.

Norman G. Hewitt, for insurance carrier.

LYON, Commissioner.—The case must turn entirely upon the decision of the question of fact, as to whether the death can be traced with reasonable certainty to the injury, and this question is exceedingly close. The fact that the wound healed after the operation by primary intention, so that the patient was able to be about, would seem to show on the face of it that the serious consequences of the deceased's injury had passed. I think it must be found as a fact that the deceased was suffering with a very severe form of heart trouble prior to his operation. This was found by the first physician who examined him and advised against an operation, and while Dr. Fisher and Dr. Steele, by the examination they made just prior to the operation, did not find the serious heart condition, Dr. Fisher did testify at the hearing, in answer to the question: "Do you care to state what your opinion was that he died of? A. Chronic interstitial syphillitic myocarditis."

The fact that this physician himself states that the heart trouble was chronic, taken in conjunction with the findings made by other physicians, makes it necessary in my opinion to find that the patient was suffering with myocarditis at the time of his

injury and of his operation. We, therefore, have a situation where a man with a serious disease which may have resulted in his death sooner or later, undergoes an operation which, while outwardly successful, leaves him in a very weak and debilitated condition and who dies within a month after the operation.

It appears to be clear from the testimony that up to February 28, 1916, the deceased, although suffering from heart disease, was in such condition as to be able to do his regular work. From the date of his injury he never does another day's work, at the end of about a month he undergoes an operation at the hands of his employer's physician and dies within less than a month after that operation, never having recovered to any greater extent than to be able to get around in a very weak and debilitated condition. In my opinion it must be found that the claimant's injury and his subsequent operation so weakened and debilitated him as to light up and hasten his previously diseased condition to a fatal close, all the more so in view of the presumption made necessary by section 21 of the Compensation Law, and I, therefore, advise that an award be made.

On the 6th day of June, 1917, the Commission acted upon the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of SELMA WORF, for Compensation under the Workmen's Compensation Law, for the Death of GEORGE A. WORF, against PHOENIX SAND AND GRAVEL COMPANY, Employer; TRAVELERS' INSURANCE COMPANY, Insurance Carrier

Death File No. 35586

(Decided June 6, 1917)

Death of George A. Worf, by drowning, while employed by the Phoenix Sand and Gravel Company, as captain of a sand scow in Brooklyn, city of New York.

The deceased, George A. Worf, disappeared about May 13, 1916. A few days later his body was found in the water. At the time of his

disappearance he was employed as captain of a sand scow which was docked in the Gowanus canal, in the city of New York, borough of Brooklyn. The only question is as to whether his death was the result of an accident within the Compensation Law. It was part of the duty of deceased to go from the dock to the boat and to do so it was necessary to pass over the water. This was a hazardous employment and where death results, accident will be presumed in the absence of evidence to the contrary. The Commission has heretofore held that where a workman who is called upon to assume a hazard in his employment disappears, such disappearance must be held to arise out of his employment. An award was made to the widow of claimant.

George A. Worf, the deceased employee, disappeared on or about May 13, 1916. His body was found in the water on May 22, 1916. Deceased was captain of a sand scow, which was tied up to a dock at the foot of Seventh or Eighth street, Brooklyn, in what is known as Gowanus canal. No one witnessed any accident, and the question to be determined is as to whether death was caused by an accident arising out of and in the course of the employment.

Claimant in person.

E. A. Willoughby and Leo Quinn, for Travelers' Insurance Company.

SAYER, Commissioner.—An award was made herein by the Deputy Commissioner who first heard the testimony. From this award an appeal was taken by the insurance carrier. The case now comes before us for a rehearing and review on the recommendation of counsel for the Commission.

Additional testimony has been offered and admitted to the record and by action of the Commission the case was reopened and is now before us for a determination on the only point in dispute, namely, did George A. Worf come to his death by reason of an accident arising out of and in the course of his employment.

I believe he did, and believe we can come to no other conclusion on the evidence in the case.

The barge upon which deceased was employed was tied to the dock at the foot of Seventh street, Brooklyn. So far as it has been possible to ascertain, deceased was last seen about three

[Vol. 14]

State Industrial Commission

o'clock in the afternoon of the day he disappeared. At that time he was going down the dock toward his boat, with his arms full of groceries, and not intoxicated. He stopped a moment to pass the time of day with an acquaintance employed at the dock. Two or three days later this witness learned that deceased had disappeared, and some days after that he saw his body in the water where the scow had been pulled out. The possibility of suicide has been suggested. No evidence has been offered to show a motive or desire or suggestion of suicide, and such a theory is wholly negatived by the fact that when last seen deceased had in his arms groceries for his meals on the boat. Evidently there was no question of an accident in the mind of the employer, for in his report of injury, signed by the treasurer of the company on May 22, 1916, the very day deceased's body was found, occur these questions and answers, "Q. Was employee injured in the course of employment?" Answer, "Yes." Q. "Was injured employee doing his regular work?" Answer, "Yes."

The deceased had a duty to go upon the boat, and part of the hazard of his employment arose from the fact that he might fall from the boat into the water. The Commission has heretofore held that a workman who is required to go to a post of danger and from thence disappears is in the course of his employment, and that, in the absence of proof to the contrary, his disappearance arises out of such employment. Such a rule is logical, and any other rule would work hardship and injustice in many cases. In such a case as this there is no more reason to suspect self-destruction than there is in the case of a mechanic found mangled by his machine or the track walker found struck by a train, and where there was no eye witness to the injury. Accident will be presumed in the absence of evidence to the contrary when death results and is the natural and logical result of the particular hazard of the employment. That being the situation here, I advise an award to the widow. No award is made to the child, since that claim is not pressed and cannot be sustained.

On the 6th day of June, 1917, the Commission acted on the foregoing opinion in the foregoing manner.

In the Matter of the Claim of **RAYMOND FROHDER**, for Compensation under the Workmen's Compensation Law, against **DAVID VAN GELDER**, Employer; **ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY**, Insurance Carrier

Case No. 11968

(Decided June 19, 1917)

Injuries sustained by **Raymond Frohder** while employed as a meat handler by **David Van Gelder** in the borough of Brooklyn, city of New York.

On the 13th day of July, 1916, the claimant, **Raymond Frohder**, while employed by **David Van Gelder** as a meat handler, was carrying heavy pieces of meat, and alleges that thereby he sustained a hernia which eventually disabled him. The only questions in the case are as to the occurrence of the accident while claimant was working for **David Van Gelder** and as to whether claimant's failure to give employer statutory notice of accident should be excused. Claimant never gave his employer any written notice. That **Frohder** had a hernia is beyond dispute; the cause rests entirely upon his own testimony. Under these conditions his failure to give statutory notice without excuse is fatal. Claim dismissed.

The employee here claims disability on account of a hernia, which he alleges occurred on July 13, 1916, as a result of a strain from lifting a hindquarter of beef in the place of his employer. He continued at work until September 7, 1916, when he claims he was in pain and unable to do the heavy work required. On September twenty-sixth he consulted a **Dr. Schroeder** who informed him he had a hernia and advised an immediate operation. This **Dr. Schroeder** then on September twenty-eighth wrote a letter to the **Zurich General Accident and Liability Insurance Company** as follows:

"September 28, 1916.

"**ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE CO.**

"55 John St., New York City:

"GENTLEMEN.—**Mr. Raymond Frohder** of 211 Foster Ave., Brooklyn, N. Y., was examined by me on September 26th at my office. I find that he has a left inguinal hernia for which I have

[Vol. 14]

State Industrial Commission

advised an operation. He informs me that he was employed by David Van Gelder of 5410 New Utrecht Ave., Brooklyn, and that it was during the course of his work that he was injured. According to his statement his work called for the carrying of heavy pieces of meat, some them weighing over 200 pounds, and while doing this work he first noticed that he had some trouble in his side. At first he gave it no thought but that finally on account of pain and discomfort he was compelled to consult medical advice. Will you kindly give this claim your attention and let me know what disposition you care to make of this matter.

"WSJr

Very truly yours,"

"C.

Receiving no reply to this letter, Dr. Schroeder wrote again on October 11, 1916, calling attention to his previous communication and then stating: "Mr. Frohder has been to see me again and informs me that he has tried to do some light work but is unable to continue on account of his physical condition, therefore he is desirous of my operating immediately."

On or about October 17, 1916, claimant called at the office of the insurance company to find out about his claim and then made an affidavit which is in the record and sets forth his statements of the facts.

No notice in writing was ever given to the employer, but claimant insists he told the employer about the occurrence two days after it happened. This he claims was in the presence and hearing of a fellow employee, one Johnson. The employer and Johnson both testify that the claimant never told them of the injury; that they knew nothing of it.

The employee filed a claim for compensation on October 31, 1916, it being dated October 26, 1916. On October 25, 1916, the employee was operated on by Dr. Schroeder, the operation being entirely successful and a good result obtained.

Claimant in person.

P. J. O'Brien, for Zurich General Accident and Liability Insurance Company.

SAYER, Commissioner: Two questions are presented by the record in this case: *First*, did an accident occur disabling claimant while working for David Van Gelder; and *second*, is the Commission justified in excusing the failure of claimant to give the statutory notice.

That the claimant had a hernia is beyond dispute. As to when and in what manner the hernia occurred, the proof rests solely in the testimony of the claimant himself. No one witnessed any accident — it is seldom that such an accident is witnessed. All the more important then is it to test his version of the occurrence by what he did, and in this respect the question of notice is of the first consideration.

Section 18 of the Compensation Law requires that notice in writing be given to the *employer* by the employee or someone on his behalf within ten days of the disability, and that failure to give such notice shall be a bar to any claim, unless excused by the Commission on the ground that notice could not have been given or that the insurance carrier or employer was not prejudiced by such failure.

It is not contended that notice could not have been given, and we must therefore determine whether we may excuse such failure because the insurance carrier or employer was not prejudiced. I do not think we may.

The only written notice claimed is the letter from Dr. Schroeder to the insurance company dated September 28, 1916, twenty-one days after claimant stopped work. Claimant seeks to excuse this by alleging he informed his employer in the presence of a fellow workman two days after the alleged accident. The employer testified: "Q. Did he tell you or ever report to you at any time between those dates (the middle of June to the beginning of September) that he met with an accident while in your employ? A. No, sir, never."

Johnson, the fellow employee, testified that he never heard anything of the accident and that claimant never spoke to him about it. I can find no reason for these two witnesses to testify falsely. The employer was insured and had no selfish interest

[Vol. 14]

State Industrial Commission

to serve. No motive has been shown for the fellow employee to testify falsely. He appears to have been friendly and when claimant was in the hospital visited him there.

Neither do I find that the letter of Dr. Schroeder of October twenty-eighth, addressed to the insurance carrier, is the notice required by the statute. It is not a notice to the employer or to the Commission as section 18 provides. There is no requirement for the employee to give notice to the insurance carrier. The doctor writing it was not ignorant of the Compensation Law, for it appears in the evidence that he was an examiner or physician for another insurance company. Rather does his letter appear to display anxiety as to whether if he operates on claimant will the insurance company pay his bill. Else why would the doctor ask the insurance company to "let me know what disposition you care to make of this matter?"

So far as the record shows, there has never been a *notice in writing* to the employer, and no facts proved to excuse such failure.

I cannot on the record in this case advise an award.

On the 19th day of June, 1917, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of LILLIAN C. ELMS, Widow, for Compensation under the Workmen's Compensation Law, for the Death of SIMEON ELMS, against BUFFALO METER COMPANY, Employer; AMERICAN MUTUAL COMPENSATION INSURANCE COMPANY, Insurance Carrier

Case No. 17873

(Decided June 19, 1917)

Injuries sustained by Simeon Elms, resulting in his death, while employed as a night watchman by the Buffalo Meter Company, in Buffalo, N. Y.

On September 3, 1915, Simeon Elms, the husband of the claimant herein, while in the employ of the Buffalo Meter Company as a watchman at a

new building which had just been erected for the company at Buffalo, N. Y., crossed the street to the premises of another concern and in the water closet there fell and broke his leg. There was no proof of accident except that the man was found lying on the floor with his leg broken and that he said he had fallen. On March 4, 1916, Mr. Elms died as the result of a cerebral hemorrhage. The natural inference is that the fall in September of 1915 was the result of brain lesion and not of an accident. The fact that compensation had been paid him during his life is not controlling. Again, although the employer's business was hazardous, Elms' employment in September, 1915, was not included in that element of the said business. Award denied.

Compensation is claimed by the widow growing out of the death on March 4, 1916, of Simeon Elms as a result, as it is claimed, of an injury sustained by him on the 3d day of September, 1915. The Buffalo Meter Company was engaged in a hazardous business, its place of business being at No. 290 Terrace, Buffalo, N. Y. It was having a new plant erected by independent contractors at No. 2917 Main street, and had not on September 23, 1915, occupied this plant. The deceased had been in the employ of one of the contractors whose work seems to have been practically completed before September third. On his application, seconded by one of the contractors, he was kept by the Buffalo Meter Company as night watchman at this building which was under construction. It does not appear that the Buffalo Meter Company itself was taking any hand in the construction of the building, that being left to independent contractors. The toilet facilities being inadequate at No. 2917 Main street, Mr. Elms had crossed the street to the premises of another concern. He is said to have told someone at this concern "water was not fit to drink in there (Buffalo Meter Company's building) it was muddy, put in new pipes and the water was not fit to drink." He fell in this water closet and broke his leg. Compensation was paid to him during his lifetime. He lived as already stated until the fourth of the following March, when he died. The insurance carrier resists payment of the claim, on the ground that there is no proper proof of an accident, that the deceased's death in no event can be traced to the accident and that the case in any event is not covered by the Compensation Law.

Wade, Ludlow & Keyes, for claimant.

Kenefick, Cook, Mitchell & Bass and Jeremiah F. Connor, for insurance carrier.

LYON, Commissioner.—The Deputy Commissioner who heard the case has written a carefully prepared opinion in which he traces the death of Mr. Elms to the accident of September third, and in this opinion I concur. I am not able, however, to concur in his conclusion that an award must follow, because I think there are one or two elements to which he did not give adequate consideration. Evidence as to how the supposed accident happened to Mr. Elms is the testimony of the claimant's witness which is as follows: "I could hear him get off the closet and go to the water tap and I heard the man fall and I looked and he was stretched right out in this form." And there is the following testimony from Mr. Bassett, the president of the Buffalo Meter Company: "I saw him at the hospital the next morning and I asked him how he got hurt and he said he went into the toilet in the Automatic Transportation Company's plant and coming out he just fell down and he could not tell how he fell down. It bothered him and seemed to worry him and he could not tell just what happened. He just fell down and broke his leg."

It will thus be seen that the only proof of an accident in this case is that the man was seen lying on the floor and that he said that he fell. Under the ruling of the court in the case of *Carroll v. Knickerbocker Ice Company*, 218 N. Y. 435, this would not be a sufficient proof of an accident had the deceased told what caused his fall. As was said in that case: "The act may be taken to mean that while the Commission's inquiry is not limited by the common law or statutory rules of evidence or by technical or formal rules of procedure and it may in its discretion accept any evidence that is offered, still in the end there must be a residuum of legal evidence to support the claim before an award can be made." In the present case, moreover, the injured man himself did not state that he had an accident. He merely was

found where he fell and himself said that he did not know what caused his fall. The death certificate states that the deceased died of cerebral hemorrhage, and it seems to be admitted by both the claimant and the insurance carrier that this was the fact, although the claimant of course claims that the hemorrhage was superinduced by the accident. In the absence of evidence to the contrary, it seems to me much more probable that he had a brain lesion which caused his fall in September, and that the hemorrhage which finally resulted in his death was a recurrence than that a fall without any apparent cause produced the hemorrhage.

The cases have held that the presumptions of section 21 do not arise until there is competent proof of an accident, and I am unable to see that any such proof is found in this rather voluminous record. Still again, I am not able to see that the deceased was covered by the Compensation Law at the time of his accident. It is true that the employer's business was hazardous, but the hazardous part of the business was far removed from the place where Mr. Elms fell. The watching of a building is not enumerated among the hazards of the Compensation Law, and Mr. Elms, so far as I can see, had nothing whatever to do with the hazardous part of the Buffalo Meter Company's business. He was located at a distant point and none of the manufacturing hazards were present. If it should be held that the Buffalo Meter Company had two lines of business, then under the decision of the court in the case of Sickles v. Ballston Refrigerating Company, his being injured while in that part of the business which is not enumerated as hazardous, would take him out from under the Compensation Law. This, of course, is based on the proposition that the Buffalo Meter Company was not itself taking a hand in the erection of the building.

It is true that the insurance carrier paid compensation during Mr. Elms' disability, and this may be taken in some sense as an admission of the proof of an accident and that he was covered by the Compensation Law. I seriously doubt, however, whether the proper execution of the Compensation Law will be promoted by holding that an insurance carrier, under such circumstances, is

conclusively bound by such an admission. Cases are continually coming before us which apparently are not very serious in their character and which insurance carriers are rather lenient about paying compensation in, and that procedure is of course to be encouraged. If this Commission and the courts hold that by so doing insurance carriers conclude themselves against contesting a claim, when subsequent events show that it is of a very much more serious nature than was supposed, it can have no other effect than to encourage insurance carriers to be much less lenient with injured workmen and insist on much more definite proofs before compensation is awarded. I think it would be a mistake if the Commission were to place too much emphasis upon the fact that the payment of compensation is a tacit agreement that the case is compensatable. I am unable to agree with Deputy Commissioner McLusky that compensation is due in this case to the widow, and advise that an award be denied.

On the 19th day of June, 1917, the Commission acted upon the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of SAMUEL LUKA, for Compensation under the Workmen's Compensation Law, against LOUIS SCHULMAN, Employer; ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier

Case No. 23673

(Decided June 19, 1917)

Injuries sustained by Samuel Luka while employed by Louis Schulman in stacking rolls of paper.

On August 12, 1916, Samuel Luka, the claimant, while carrying and stacking heavy rolls of paper on the premises of his employer, Louis Schulman, was injured by one of the rolls falling off a stack and striking the claimant's arm. He was severely injured and compelled to undergo several operations. The only question for determination is whether his condition can with reasonable certainty be related back to the accident of August 12, 1916. It was shown that it would require a blow from

some heavy body to produce the condition in which claimant's arm now is. It was also shown that claimant first said that he was struck by a falling roll and that when he changed his statement he did so at the suggestion of his employer. *Held*, that under the circumstances the employer or his insurance carrier cannot now lay stress upon the misstatement. An award was made.

An award was made in this proceeding on the 13th day of March, 1917, from which the insurance carrier has taken an appeal. The claimant alleges that on the 12th day of August, 1916, while handling heavy rolls of paper, a roll fell striking his arm. The rolls are about twenty-six inches in diameter and are often piled up three, four and five rolls high. The employer states that sometimes they are as high as the ceiling. The claimant immediately complained of his injury and notified his employer orally, who finally advised him to consult his doctor. He has since been afflicted with a very serious infection which the doctors designate as osteomyelitis. On the fourteenth of September he went to the Mt. Sinai Hospital, whose records give the following description of the condition of his arm at that time: "Arm, apparently no limitation of motion at shoulder and wrist; no pain on any joint motion; biceps weaker than right side; triceps also weaker; forearm somewhat weaker; biceps jerky, presenting no external signs of inflammation, no redness, no edema or swelling, but pressure over humerus causes exquisite pain; apparently there are two tender areas,—from just above the condyles to two inches above the bone is tender, for the next 1½ inches there is very little tenderness, and above this from just below the head to below the deltoid insertion there is extreme tenderness to pressure over the bone, slight thickening at deltoid insertion; touch sensation over arm is normal.

"September 15.—Exquisite tenderness at level of deltoid insertion and at level third of humerus indicated miliary abscess at the sides. Operation by Dr. Brickner September 15th under ether,—incision over humerus, outer aspect of muscles dissected and muscular spiral nerve drawn aside, trephined openings through thickened corticals just below medial shaft and a large amount of thick creamy pus evacuated from lower end of mili-

[Vol. 14]

State Industrial Commission

ary cavity; no pus evacuated from above, so a second generous trephined opening made just below deltoid insertion and pus evacuated from upper end of bone cavity; medulla washed out above and below; skin and muscles sutured in immediate portion of wound, upper and lower ends left open but no drain inserted; wet dressings.

"September 16, 17 and 18.—High temperature continued.

"September 19.—Operation by Dr. Brickner under ether. Wound opened, cortex chiseled away between second and third trephined openings; no pus; cortex chiseled away from upper bone opening almost to surgical neck of humerus; some pus evacuated, curetted out to upper end of bone; bone cavity packed with iodine gauze and wound left open.

"September 21.—Fever continues, but less tenderness over lesser tuberosity."

On May 11, 1917, our medical department made an examination of the claimant and made the following report: "Examination of left upper arm shows evidence of an extensive incision over outer border, beginning at the acromion process and extending up to elbow joint, in consequence of an operative procedure for osteomyelitis. Condition at present shows evidence of a suppurating sinus and necrosis of bone, which will require further surgical interference. Prognosis as to ultimate recovery is not very good."

The question to be determined is, whether the claimant's serious condition can be traced with reasonable certainty to the accident which he suffered on August 12, 1916.

Claimant in person.

T. Carlyle Jones, for insurance carrier.

LYON, Commissioner.—From the above statement of facts it is quite evident that the claimant is in a very serious condition. It seems to be admitted, at all events it is not seriously controverted, that a serious blow to the arm, such as might be occa-

sioned by the fall of a heavy roll of paper from a considerable height striking the arm, could be the cause of the osteomyelitis with which every one seems to agree the claimant is afflicted. The question, therefore, resolves itself down to a determination of the fact whether, or not, the claimant did receive such a blow. The insurance carrier is very insistent that such a finding cannot be made because of the claimant's own testimony, the claim of the insurance carrier being that the claimant's first allegation was that his injury consisted in a strain of his arm and that it was not until after a discussion in his presence showing that not a strain, but a blow, is necessary to cause the claimant's condition, that he changed his testimony, claiming the accident to have arisen from a blow and not from a strain. In the claimant's claim for compensation, in answer to the question: "How did the accident happen?" he replied, "While handling merchandise arm was injured." The attending physician's statement contains the following: "State in patient's own words how accident occurred. Alleges in lifting weight felt pain in left arm." The employer's first notice of injury says the accident occurred "lifting heavy cases and straining arm." An agreement for compensation was made between the claimant and the employer in which occurs the following: "How accident happened? Injured was lifting rolls of paper." This certainly does not on its face look like the claim of a man who received his injury from a blow, such as the claimant now claims he received, and if there were no explanation of these inconsistencies, I should be disposed to advise a denial of an award, on the ground that there was no proof of an accidental injury which caused the disability. There is, however, an explanation which to my mind is rather convincing. It comes from the testimony of the employer himself, who testifies as follows: "He must have been in the place when he came to me and said a roll of paper fell on him. I told him, 'That is not the first time,' he should not bother about it. He said his arm hurts him. I said, 'Rest a little while and go to work again.' He rested a little while and then he went to work. He came back, 'My arm still hurts me.' 'Go see a doctor and do some-

[Vol. 14]

State Industrial Commission

thing about it.' He wanted to go home. Go home, I sent him I believe to his own doctor, if I recall right. Q. Did he say he had hurt himself that very day, when he first reported to you? A. He did. He said a roll of paper fell on him. 'My arm hurts me.' Commissioner Lyon: Do you recall now that he said a roll of paper fell on him? Witness: He said a roll of paper fell on him. Commissioner Lyon: Do you remember now that he told you that then? Witness: I remember distinctly that he told me a roll of paper fell on him. Mr. Jones: Is that correct? Witness: It was this way; he came and said a roll of paper fell on him. Couple of days after he came and filled out that paper. I told him he cannot get hurt by a roll of paper. You can get hurt by a case. Maybe you strained your arm or something. Mr. Jones: Did he say that to you? Witness: I said that to him. Mr. Jones: What did he say? Witness: 'I don't know what it is.' I told him to go to the doctor. Commissioner Lyon: It wasn't anything peculiar for a roll of paper to fall on him? Witness: No, happens pretty often. Commissioner Lyon: If he told you a roll of paper fell and hit his arm, why didn't you put it in the report that way? Witness: Because I didn't believe him. How can a roll of paper hurt him? Commissioner Lyon: I will tell you why. We are trying to find out if there is any reason for his having changed his statement that he had a strain over to the statement that paper fell on him. Witness: It might have been in my mind to put down that he might have been strained arm. I wanted to state spraining arm as far as that goes. Before roll fell on man and I tell him, 'Go on, get busy.'"

It appears that the claimant immediately notified his employer that he was hurt by a roll of paper falling upon him and that the employer, with this definite notice from the claimant, instead of putting into his report of injury the statement as it came from the claimant, inserted, "Lifting heavy cases and straining arms," and insisted that the claimant should so state his case. It is not very clear just why claimant should have acquiesced in the wish of his employer, but having done so, I do not see how the employer or his insurance carrier can now lay stress upon the

fact that the statement of the cause of the injury was not properly worded. On the statement of the employer the discrepancy in the description of the accident is due to his own inconsistency. There seems to be no doubt in the minds of the medical men that the claimant's present condition can be traced to the accident which happened to him on the 12th of August, 1916, provided an accident occurred as the employer now says it did, and I think in case of doubt we can safely rest our decision upon the testimony of the employer himself, and I, therefore, advise an award.

On the 19th day of June, 1917, the Commission acted upon the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of CLARENCE H. PHELAN, for Compensation under the Workmen's Compensation Law, against E. W. BLISS COMPANY, Employer; ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier

Case No. 29120

(Decided June 19, 1917)

Injuries received by Clarence H. Phelan while employed by the E. W. Bliss Company at its factory in Brooklyn, N. Y.

In the spring of 1916, the exact date not having been shown, the claimant, Clarence H. Phelan, while at work on a machine in his employer's factory in Brooklyn, pulled up on a wrench and sustained a strain. Two questions are presented in this case, the one as to whether claimant sustained any disability as the result of an accidental injury while at work for his employer, and the other as to whether the claimant's failure to give statutory notice of the injury can now be excused. Phelan gave no notice of injury within the statutory period, nor did he file any claim with the Commission until nine months had elapsed from the time of the injury alleged. It does appear, however, that at the time of sustaining the injury claimant had a talk with the foreman of the factory and told him how he felt and what had caused the injury. *Held*, that the employer through the foreman had full knowledge of the injury. The failure of the claimant to give statutory notice did not prejudice any rights of the employer or the insurance carrier. An award was made.

Clarence H. Phelan sustained an injury while working for the employer at its factory in Brooklyn on a day the latter part of April or the first part of May, 1916; the exact date of such injury has not and cannot be established. No written notice was given to the employer within the time specified in the law nor was a claim for compensation filed with this Commission until the 15th day of February, 1917. Claimant's disability is diagnosed as acute cardiac dilation produced by traumatism. The claim is resisted on the ground of failure to give notice and also lack of proof that an accident happened.

Albert E. Richardson, for claimant.

T. Carlyle Jones, for insurance carrier.

SAYER, Commissioner.—This case presents two questions: *First*, did the claimant sustain a disability as the result of an accidental injury while working for the employer, and, *second*, is the Commission justified in excusing his failure to give notice within the time specified in the act. The evidence sufficiently establishes an accidental injury for which an award should be made if delay in filing claim and giving notice can be excused. Claimant testified that on a day the end of April, 1916, he was working on a machine. His testimony is as follows: "I pulled up on wrench and all of a sudden something snapped in here. I thought it was just like something, like you snapped your finger. I felt faint and a couple of co-workers carried me to the roof. I had to get air." He further testified that he was laid up for two weeks after he felt the first snap and then thought he could go back to work, and after working an hour and a half he had another spell and had to quit. Claimant said that he informed his foreman of the injury at the time that it happened. Subsequently he went to a Doctor Ball who told him there was nothing to do except to rest. He was later treated by a Doctor Casey who has filed a report describing the injury as follows: "Acute cardiac dilation produced by traumatism—over strain—pulling on wrench to tighten shell in chuck." The doctor in his report describes the occurrence in the words of his patient as follows:

"Was pulling on lathe when heard a sudden snap in left chest about the heart. I became weak, felt like fainting, heart fluttered and raced like automobile engine—had to discontinue work."

Were this the only point involved, there would be no difficulty in making an award, but it appears that claimant gave no written notice to the employer and did not file a claim with this Commission until February following the injury, a period of nine months. Unless the Commission is justified in excusing claimant's failure to give the statutory notice, an award cannot be made.

Section 18 provides that "notice of injury for which compensation is payable by this chapter, shall be given to the Commission and to the employer within ten days after disability," and further on in the section provides that "the failure to give such notice, unless excused by the Commission either on the ground that notice for some sufficient reason could not have been given, or on the ground that the State Fund, insurance company, or employer, as the case may be, has not been prejudiced thereby, shall be a bar to any claim under this chapter."

Manifestly in this case failure to give notice could not be excused on the first ground for there is no evidence to sustain a finding that the claimant or someone on his behalf could not have given such notice. The only ground upon which it can be urged that failure should be excused is on the ground that the insurance company, the employer having been insured, has not been prejudiced thereby.

The Court of Appeals in *Matter of Bloomfield v. November*, 219 N. Y. 374, and the Appellate Division in the case of *Sicardi v. Sarnoff Hat Company*, 176 App. Div. 13, have cautioned the Commission that excusing such failure on the part of an employee is not lightly to be made. The requirement of the statute is not to be treated as a mere formality or to be dispensed with as a matter of course. *Matter of Bloomfield v. November, supra.*

In that case the Court of Appeals stated, "We do not think that it is good practice that the service of such notice should be

excused without any finding of the existence of conditions which justified such action on the part of the Commission, or statement even of the theory on which the excuse has been granted."

This direction of the court does not preclude us, in my opinion, from excusing the failure to give notice when facts are presented to the Commission that justifies such excuse and upon which the Commission makes a finding. The Commission is warranted on the evidence in this case in a finding that the employer had knowledge of the circumstances of the injury. The employer's foreman was called and examined by the attorney for the insurance carrier. He had charge of the shift in which the employee worked. He was asked whether he knew the claimant and remembered him, then testified as follows: "Q. Did you know of his telling you he had met with accident? A. Yes sir. Q. What time was that? A. I don't know date. Q. How long ago was it? A. Pretty near a year, I guess. Q. What did he tell you? A. The day he was hurt? Q. What did he tell you at that time? A. I thought he said he has hurt himself inside. He thought he hurt himself inside."

Further on he testified in answer to a question whether the claimant continued to work, as follows: "A. No, he went out to the toilet; he was white as a ghost and tried to take a glass of water there; he stayed fifteen minutes and then he wanted to go home. Q. Have you seen him since then? A. He came back about a week later. Q. What did he say to you? A. He tried to work that night and fell over again. I let him go on the roof to get some air."

It is noticeable that this foreman's testimony agrees in every particular with that of the claimant although he was called to testify on a later date and it was nearly a year after the occurrence, and the foreman further testified that he had seen the claimant only once since the accident and that was around Christmas time when he met him on a car. Being pressed further on his examination, the foreman testified in answer to the question by the insurance carrier's attorney: "Q. What did he tell you had happened and how it happened? A. He was pulling on chuck

wrench. I wanted to have all the men make sure and have the thing good and tight because if it slipped it would break all the tools and we were short of tools at that time. While pulling on it, he strained himself."

The foreman also testified that at the time of the accident, he went to the claimant and assisted him; that he was not more than five feet away from him at the time of the occurrence.

On this testimony there can be no question but that the responsible man in charge of this employee had full knowledge of the injury. According to the time records of the employer, the last day the claimant worked for which he was paid, was April twenty-fifth. This, we are entitled to find, was the date of the claimant's injury. The insurance carrier contends that its policy with the employer terminated on May 17, 1916. In view of the record in the time book of the employer, there can be no question but that the employee was injured during the time when the policy of insurance of this insurance carrier was in full force and effect.

I would have no hesitation in saying that the employer was not prejudiced by reason of the claimant's failure to give a written notice, but does knowledge on the part of the employer import knowledge on the part of the insurance carrier? I am of the opinion that it does.

Section 54 of the Compensation Law, subdivision 2 thereof, provides as follows: "Every such policy shall contain a provision that, as between the employee and the insurance carrier, notice to or knowledge of the occurrence of the injury on the part of the employer, shall be deemed a notice or knowledge, as the case may be, on the part of the insurance carrier."

We must assume that the legislature intended something when it used the words in the section just quoted "notice to or knowledge of" the occurrence of an injury, and we must give effect to the language. Under the rule laid down in the case of *Sicardi v. Sarnoff Hat Company*, *supra*, I believe we can come to no conclusion except that knowledge of the occurrence of the injury by the employer's agent or foreman was knowledge of the occurrence by the employer, and therefore by the insurance carrier. In no other way can we give effect to the statutory provision.

[Vol. 14]

State Industrial Commission

Claimant testified that after his injury he went away down on Long Island to stay with relatives. His doctor recommended rest. He might well have believed that his injury was not serious and that a little rest would clear it up. We cannot speculate as to his reasons, but whatever his reasons may have been, I am constrained on the evidence to hold that the employer and insurance carrier were not prejudiced by the claimant's failure to give notice.

I, therefore, advise a finding that the claimant's failure to give notice within the statutory time is excused on the ground that the employer had knowledge of the occurrence and that therefore the insurance carrier was not prejudiced thereby.

I advise an award in this case.

On the 19th day of June, 1917, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of ALEX STEIN, for Compensation under the Workmen's Compensation Law, against BRIGHT STAR BATTERY COMPANY, Employer; TRAVELERS' INSURANCE COMPANY, Insurance Carrier

Case No. 37191

(Decided August 6, 1917)

Injuries sustained by Alex Stein while employed by the Bright Star Battery Company as a shipping clerk.

On January 14, 1916, the claimant, Alex Stein, was at work in the shipping department of the Bright Star Battery Company and while so employed he was struck in the left eye by a particle of steel from a hatchet which he was using. The result was the loss of that eye. Sucher, the foreman of the department, saw the accident. The main questions involved here are as to whether the accident is within the statute and whether the failure of claimant to give formal notice can be excused. The happening of the accident itself was clearly established. The testimony as to whether the chief shipping clerk knew of the injury and duly reported it to the company is obscured by a mass of conflicting testimony. The testimony of the president of the employing company was, however, disregarded on account of his "evasive, shift and uncertain" answers. Sucher was found to be the representative of the company and hence his knowledge of the accident was the knowledge of the employing company. An award was made.

A claim was filed with this Commission on September 9, 1916, by Alex Stein for compensation for the loss of the left eye due to an accident alleged to have been sustained by him while working in the shipping department of the Bright Star Battery Company on January 14, 1916. On that day, it is claimed, a small piece of steel flew from a hatchet, imbedding itself in the claimant's left eye. The accident appears to have been witnessed by one Sucher, chief shipping clerk, who was claimant's immediate superior, and who was working in the same room and near to claimant. Claimant did not return to work the next day, but telephoned he could not work on account of his eye. After two days, however, he did return, and continued in the same employment until May following, when he left his employment voluntarily. He was seen to put drops in his eye on occasion, during his employment, and he occasionally took part of a day off to have his eye treated at a dispensary.

No formal written notice was given to the employer and no claim was filed until nearly nine months after the accident and four months after claimant stopped working.

The Commission must determine whether the condition of claimant's eye is due to an accident arising out of and in the course of his employment, and if so, whether claimant's failure to give written notice to his employer within the statutory period should be excused.

A. H. Kaminsky, for claimant.

E. A. Willoughby, for carrier.

SAYER, Commissioner.— This case presents two main questions. The first is — did Alex Stein meet with an accident in the course of his employment and arising therefrom, which caused his present loss of vision? I think no other conclusion can fairly be drawn from the evidence than that he did. The testimony of the claimant supported by two other witnesses of the accident, that something flew in his eye while nailing up a box, the subsequent discomfort and redness of the eye getting progressively worse, and

later X-ray examination and removal of a small piece of steel from the eye, all lead irresistibly to the conclusion that an accident happened as claimed.

A far more serious situation is presented in the question of failure to give notice. If notice was not given and thereby the employer or insurance carrier was prejudiced, this Commission must deny an award unless the facts warrant the excusing of such failure.

This Commission has held that an employer is not prejudiced by failure to give notice, under certain conditions, when it appears that the employer had actual knowledge of the accident. Unfortunately in this case the simple question of fact whether the employer had knowledge of the accident is involved in a mass of vague, uncertain and unsatisfactory testimony. Sucher testifies that he was the chief shipping clerk; that he knew of the injury to claimant's eye at the time and that he reported that fact verbally to the president of the employer company. He testifies it was his duty to make a report of any injury occurring in the shipping department but that he failed to make a written report in this case as he did not consider it necessary, the injury appearing so slight. If Sucher had a duty to make a report of the occurrence, he owed that duty to his employer, and this claimant may not fairly be prejudiced in his claim by the failure of his immediate superior to carry out his duty properly.

The insurance carrier claims prejudice and gives as a ground therefor that the facts of the accident can only be established by discharged employees. It appears, however, that this most important witness in behalf of the claimant not only was not discharged, but that he left the employ some months later of his own accord and was given an excellent recommendation by the company, the president and the manager of the company both testifying that so far as they knew he was entirely reliable and an honest person.

Testimony has been offered by the mother of claimant that she wrote a letter to the company asking for assistance on account of the expense to which her son was put through the accident that

he sustained in their employ. While this letter does not comply with the legal requirements of notice and the contents of it are somewhat vague, still there can be no doubt that such a letter was received by the company, for the president of the company admitted receiving a letter which he turned over to one of his employees without reading, and said that probably it was thrown in the waste basket. Through the failure of the president of the company to produce the letter, as he was requested to do, and his evasive answers with regard to its contents and the time of its receipt, the date of the sending of such letter cannot be established with reasonable certainty. It is fair to assume, under all the circumstances, that the letter was written shortly after the actual disability manifested itself.

It is true the president of the company testifies that he knew nothing of an accident to the claimant; that Sucher was not the boss of the shipping room; that Sucher never reported to him an injury to this claimant and that he knew nothing of the contents of the letter which he admitted receiving from the claimant's mother. I believe, however, that the Commission is justified and in fact that it is its duty to disregard entirely the testimony of the president of the employer company. Seldom have I seen a witness whose demeanor on the witness stand, and whose testimony and general attitude, made a more unfavorable impression. At first he denied every material fact and when pressed on cross-examination he took refuge in the failure of memory. His failure of memory on cross-examination was ridiculous and his replies were so evasive, shifty and uncertain as to cast grave doubt upon his credibility as a witness.

It must be borne in mind in considering the facts in this case that the original injury to the eye was slight, such as occurs frequently, and to which serious attention is seldom paid. It doubtless never occurred to the claimant that this slight accident might months later result in an infection causing the loss of vision in his eye. Moreover, the claimant is not a person of mature judgment and information. He is a minor, being at the time of the injury seventeen years of age. Because of that fact, he could not

[Vol. 14]

State Industrial Commission

of himself take any action or omit to take action which would prejudice his rights or liabilities in ordinary civil affairs. The sound public policy which declares that a minor is incompetent to take action affecting his ordinary civil rights, would seem to require that this Commission should give great consideration to his immaturity in considering whether it will excuse any failure on his part to carry out the strict requirements of the law.

The knowledge of the employer of the injury was knowledge of the insurance carrier. Compensation Law, § 54.

I am convinced that the claimant met with an accident in the course of his employment in the manner described by him, and I believe the Commission is warranted in finding that his failure to give written notice within the statutory period is excused on the ground that the employer had knowledge of the accident and that therefore neither it nor the insurance carrier was prejudiced by such failure.

I advise an award.

On the 6th day of August, 1917, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of CHARLES M. EDWARDS, for Compensation under the Workmen's Compensation Law, against HAVENS & WILDE, Employer; ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier

Case No. 41577

(Decided August 6, 1917)

Injuries sustained by Charles M. Edwards while employed by Havens & Wilde as a carpenter.

On December 24, 1915, the claimant, Charles M. Edwards, while at work for Havens & Wilde as a carpenter, attempted to lift a ladder to a house where he was at work and in so doing sustained an injury. He gave no notice of the accident at the time to his employer, either oral or in writing. In the spring following when a new job was offered him by the same employer he stated that he had been ill all winter from heart trouble.

In the latter part of June or the first part of July, 1916, the employer first learned that Edwards claimed to have sustained an injury while at work for Havens & Wilde. Under the circumstances shown in this case, *held*, that the principle established in cases of the sort here presented has been to allow great liberality in excusing want of notice where the employer and the insurance carrier have had knowledge of the accident, thereby not being prejudiced by such excuse, but where as in this case no knowledge was given to the employer the want of statutory notice cannot be excused, and this is also the rule as laid down by our courts. Award denied.

This is a claim on account of an injury alleged to have been sustained by the claimant while in the employ of Havens & Wilde on December 24, 1915. Claimant, who was working as a carpenter, describes the injury as due to a strain of lifting a ladder up to a house on which he was working; that he felt a sudden pain in the region of the heart. He continued at work, however, and on December 24, 1915, was laid off because of there being no further work for him. Claimant made no complaint to his employer although he alleges that he spoke of the pain to a fellow-workman who was assisting him in raising the ladder. No written notice was ever given to the employer and sometime the following spring, a member of the employer firm called at the claimant's house to get him to go to work on a new job. He was then informed that claimant had been ill all winter from heart trouble. Even at that time he made no mention of any accident in connection with his illness. Sometime after this, in the latter part of June or first part of July, 1916, claimant called his employer on the 'phone asking him to come to his house, which the employer did, and it was then for the first time that the employer learned that the claimant alleged he had sustained an injury while in the employer's service and that his condition was due to such injury.

Earl J. Bennett (Remsen B. Ostrander, of counsel), for claimant.

James B. Henny (T. Carlyle Jones, of counsel), for employer and insurance carrier.

SAYER, Commissioner.—In my opinion this claim cannot be allowed. The testimony raises two very serious questions to be determined by this Commission. The first question is as to whether an accident occurred which caused the disability from which the claimant is now suffering; and the second is whether if such an accident occurred, the Commission can excuse the failure of the claimant to give notice to his employer. It is extremely doubtful upon the medical testimony whether the claimant's condition can be attributed to any accident arising out of and in the course of his employment. Without passing finally upon that question, however, I am of the opinion that the claimant's failure to give notice cannot be excused under the law as interpreted by our courts. This Commission has been liberal in excusing delayed notice when the evidence has shown that the employer had knowledge of the accident and thereby neither the employer nor the insurance company could justly claim prejudice or else that notice could not have been given. Neither of those conditions exists in this case. The employee left work on December 24, 1915, not because of any disability, but because of a lay off of help. The fact that the employer knew nothing of any accident occurring to this claimant is supported by the fact that some months later in the spring time, when work started up again, he went to the claimant's house to see if he would come to work. Even then the claimant made no mention of an accident as the cause of his physical condition. He stated that he had been suffering from heart trouble all winter. The claimant was sixty-five years of age at the time of the accident and his present condition discloses distinct arterial changes that are common in men of his age. It is urged in the claimant's brief that during these months the claimant was too busy trying to keep alive to think of giving notice to his employer. However, when his employer called upon him in April he says he found him up and about the house and talked with him and even then the employee did not suggest an accident. Again it is urged that the employee did not know of the requirements of the Workmen's Compensation Law. The Commission is not warranted in a finding in favor of

the claimant upon such a ground. At the time of the alleged accident, the Workmen's Compensation Law had been in effect for one and one-half years. The claimant is an intelligent American whose ignorance of the law, if it really existed, was not due to any inability to speak the language or to be generally informed as to matters affecting his employment and his rights thereunder.

Upon all the facts, I recommend that an award herein be denied.

On the 6th day of August, 1917, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of WILLIAM HERNON and MARGARET HERNON, Father and Mother, for Compensation under the Workmen's Compensation Law, for the Death of EDWARD J. HERNON, against WILLIAM L. HOLIHAN, Employer; LONDON GUARANTEE AND ACCIDENT INSURANCE COMPANY, Insurance Carrier

Case No. 17069

(Decided August 13, 1917)

Injuries sustained by Edward J. Hernon, resulting in his death, while employed by William L. Holihan as a lumber handler.

An August 23, 1916, Edward J. Hernon, while at work for William L. Holihan, was unloading lumber from within a car to a man outside. As he worked in a close car where there was little air about noon he was overcome and in the afternoon of that day died of a sunstroke. In this case the dependency of the father and mother of deceased is clearly established. The work which deceased was doing, handling lumber in a close car on a very hot day, subjected him to special hazards, and the accident was one arising out of and in the course of his employment. An award was made. Sayer, C., dissents.

This is a claim for compensation made by William Hernon and Margaret Hernon, respectively father and mother of Edward J. Hernon, deceased, for compensation under the provisions of the Workmen's Compensation Law growing out of the

[Vol. 14]

State Industrial Commission

death of said Edward J. Hernon by reason of an accidental personal injury sustained by him, arising out of and in the course of his employment by William L. Holihan. The deceased died on August 23, 1916, as a result of a sunstroke. On that day he was employed by William L. Holihan, engaged in the business of inspecting lumber, trucking and storage. The day was unusually warm and the deceased was required to work in a close car with very little air. His duties were to hand out lumber piled in the car to a man outside, who piled it on a truck at the door of the car. The lumber consisted of one-inch plain white wood boards ten to sixteen feet long. He started to work at about eight o'clock in the morning. Toward noon he was unable to continue his work, complaining of dizziness.

In the afternoon he died of sunstroke.

Benjamin W. Moore, for claimants.

B. A. H. Smith, for insurance carrier.

MITCHELL, Chairman.—In this case two questions are presented for determination, *first*, whether the claimants were dependent upon the deceased at the time of his death; and *second*, whether death was the result of an accident arising out of and in the course of employment. As to the first question, the dependency of both father and mother is clearly established. The second question, I believe, should be answered in the affirmative. The deceased was required to work on a very hot day in a close car handling lumber which required great exertion. This work under these circumstances, therefore, subjected him to a special and increased hazard. The deceased sustained a sunstroke, not by reason of a risk assumed by the public in general, but because of the special circumstances under which he was required to work.

An attempt has been made on the part of the insurance carrier to show that the deceased was a drinking man. It was testified by the employer, however, and by other witnesses, that the deceased was never under the influence of liquor while perform-

ing his duties in his employment, and that on the day of his death there was not the slightest indication that he had been drinking. There is no evidence to the effect that death was due solely to the intoxication of the employee while on duty.

I advise that an award be made.

Sayer, Commissioner, dissents.

On the 13th day of August, 1917, the Commission acted upon the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of MOE MARK, for Compensation under the Workmen's Compensation Law, against JOSEPH BERMAN, Employer; SOUTHWESTERN SURETY COMPANY, Insurance Carrier

Case No. 22483

In the Matter of the Claim of MORRIS COHEN, for Compensation under the Workmen's Compensation Law, against JOSEPH BERMAN, Employer; SOUTHWESTERN SURETY COMPANY, Insurance Carrier

Case No. 27445

(Decided August 14, 1917)

Effect of rider to an insurance policy where a transfer of interest in the business has occurred.

The only question herein grows out of the claim on the part of the insurance company that in each case the policy had been forfeited. That the accidents complained of in the two cases had occurred was conceded. Subsequent to the issuance of the policy Sylvester Albert transferred his interest in the business to his copartner, Joseph Berman. The policy covers both cases and was issued to J. Berman and Sylvester Albert, copartners. In this State such a transfer will not avoid the policy. The history of the question in the courts of this State outlined. Award made against the employer and the insurance company in both cases.

In these two cases there is no question as to the claimants being entitled to compensation.

The insurance carrier, however, resists payment of compensation on the ground that by a change in the copartnership to which the policy of insurance ran there was a forfeiture of the policy and that no claim can therefore be maintained thereunder. The same policy of insurance covers both cases, and was issued to the copartnership of J. Berman and Sylvester Albert. Subsequently to the issuance of the policy, the firm changed their place of business and this change of address was duly noted on the policy by a rider. Thereafter, Sylvester Albert transferred his interest in the business to his co-partner, Joseph Berman.

The testimony is, that the policy was taken to the original broker through whom it was secured for the purpose of having this change of ownership noted, and the broker testifies that he took it to the office of the regular agents for the Southwestern Surety Company and received from them a binder covering the risk while the policy was being changed. Thereafter, instead of attaching to the policy the usual rider showing change of ownership, the agents for the insurance company requested written assurance from Joseph Berman, the remaining partner, that he would stand liable for the premium to be based on the pay-roll. This assurance, the broker testifies, was secured in writing and the policy with this assurance attached was again returned to the regular agents for the surety company for the purpose of having the usual rider showing change of ownership attached. Neither the policy nor the rider has been produced, both parties claiming that they have made search in vain for the same. The broker explains the absence of these papers by the fact that his office was subsequently given up and all his papers scattered and lost.

The policy contained, among others, the following conditions: "No assignment or change of interest under this policy shall bind the corporation unless its consent shall be endorsed hereon, or attached hereto, signed by the duly authorized officer of the corporation."

The question to be decided is whether the Southwestern Surety Company is liable under these circumstances for the compensation to the claimants in these cases.

Jacob Gallerstein, for claimant.

J. P. Hier and Mr. Eaton, for insurance carrier.

LYON, Commissioner.—There seems to be the highest authority for the proposition that in this State at least, the transfer by one partner to another of his interest in a firm is not such a transfer of interest as to avoid a policy of insurance which contains a proviso that a sale of the business shall forfeit the policy.

In the case of *Hoffman v. Aetna Fire Insurance Company*, 32 N. Y. 405, the court said: "The weight of judicial authority in this State is against the doctrine that a policy issued to a firm is forfeited by a transfer of interest as between the parties assured. As a contrary opinion has prevailed to some extent, it may be well briefly to retrace the history of this question in our courts."

The court thereupon reviewed several important cases and then states: "It is quite apparent, therefore, that, in this State, there is a decisive preponderance of judicial authority against the recognition of a sale by one to another of the assured, as cause of forfeiture within the meaning of the proviso. But if the authorities were in equipoise, and the solution of the question depended on general reasoning and the application of settled and familiar principles of law, our conclusion would be in accordance with that of the court below. * * * It is suggested that the proviso may have been designed to secure the continuance in the firm, of the only member in whom the insurers reposed confidence. The only evidence of their confidence in either, is the fact that they contracted with all; and the theory is rather fanciful than sound, that they may have intended to conclude a bargain with rogues, on the faith of a proviso that an honest man should be kept in the firm to watch them. Certainly, nothing appears in the present case to indicate that all the assured were not equally worthy of confidence; and it is not to be presumed that, in any case, underwriters would deliberately insure those whose integrity they had reason to distrust."

If this be the law in the State of New York, and there is no claim that the case quoted has been overruled, it would seem to

[Vol. 14]

State Industrial Commission

be entirely immaterial whether the change in the firm was noted on the policy or not.

However, I am also of the opinion that sufficient was done to continue this policy in force to cover J. Berman after the purchase by him of his partner's interest, even if the transfer were a sale within the meaning of the conditions of the policy.

There is no denial of the statement that a binder was issued to J. Berman and I found no contradiction of the testimony of the broker that the only objection made by the insurance company's agents to the proper indorsement of the policy was that they had not the assurance from Joseph Berman that he would stand liable for any additional premium which might become due. There is also no denial that this written assurance was given to the insurance company and I am of the opinion therefore that the binder was continued in force until such time at least as the insurance company had either put the proper indorsement upon the policy, or returned it to the assured with the definite statement that they refused to carry his risk.

I, therefore, advise an award against Joseph Berman and the insurance company in both cases.

On the 14th day of August, 1917, the Commission acted upon the foregoing matters in accordance with the foregoing opinion.

In the Matter of the Claim of PATRICK REDDY, for Compensation under the Workmen's Compensation Law, against NATIONAL EXCAVATING AND FOUNDATION COMPANY, INC., Employer; FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Insurance Carrier

Case No. 54743

(Decided August 14, 1917)

Question involving method of practice by the Commission as to continuing cases.

In this case the matter of the injuries of Patrick Reddy, the claimant, was investigated very fully, an award made which was affirmed by the

Appellate Division of the Supreme Court, third department, and the matter was then put upon the calendar of the Commission again for determination as to what further disability claimant had suffered. The insurance carrier, however, objects, and asks that the case be closed, for the reason that in the parallel case of *Bowne v. Bowne Manufacturing Company*, subsequent to the decision herein by the Appellate Division above mentioned, the Court of Appeals has laid down a doctrine which practically reverses the decision of the Appellate Division and the Commission herein. In denying the application the Commission points out distinctions between the case depended upon by the insurance carrier and the case herein, and states the correct practice before the Commission. Motion denied and case put upon calendar.

This matter came on for several hearings before the Commission when a large amount of testimony was taken. The case was argued at length and voluminous briefs were filed, and after careful examination it was found that the claimant was an employee of the National Excavating and Foundation Company, Inc., and covered by the policy of the above named insurance carrier, and an award was made for full compensation at fifteen dollars per week for sixteen weeks and the case continued for consideration as to further disability. An appeal from said award to the Appellate Division of the Supreme Court, Third Department, having been taken, the award was affirmed, whereupon the matter was placed on our calendar again to consider what further disability the claimant has suffered.

There is no claim that Mr. Reddy is not still disabled to some extent, but the insurance carrier resists any further award and asks that the case be closed, on the ground that since the decision of the Appellate Division herein, the Court of Appeals in the case of *Bowne v. Bowne Mfg. Co.*, has made a decision which in effect overrules this Commission and the Appellate Division in this proceeding.

This is the only question now before us. The facts are set forth quite at length in our former decision reported in the Bulletin, Vol. 2, No. 2.

J. Power Donellan, for claimant.

William H. Hotchkiss, for insurance carrier.

LYON, Commissioner.—I have very serious doubts whether this Commission has a right, after its award has been affirmed by the Appellate Division, to make a further decision, on the same testimony, which necessarily proceeds upon the theory that its former findings are wrong, because the Court of Appeals, in another case, has made a decision which may seem to be at variance with the law of this case.

The decision which we are now asked to make, presupposes that our former decision which has been affirmed is wrong. If it be so, it would seem that the orderly administration of the law would require that the decision of the Appellate Division should be rescinded by that court or reversed by the Court of Appeals.

We can hardly hope to find precedents for the proceedings in the law books, because the compensation law provides for repeated awards for disability growing out of the same accident, whereas, at common law, one recovery exhausts the plaintiff's remedy. It is true that the statute gives the Commission continuing jurisdiction and the courts have held that this gives us the right to reconsider and modify or rescind our awards in the interest of justice, but I do not understand that this gives us the right to reverse findings of fact and conclusions of law, which by the affirmance of our award have become *res adjudicata*. It would seem that by the affirmance of the Appellate Division the law of the case has been established until reversed by a higher court.

But I do not think the decision of the Bowne case should have the effect upon this case, which the insurance carrier claims for it, even if we were free to reverse our former action. Mr. Bowne was a large stockholder and an executive officer of the Bowne Manufacturing Company and his duties were almost entirely executive. In an emergency he turned aside to manual labor, where he was hurt. In the present case Mr. Reddy was neither a stockholder, a director, nor an officer of the National Excavating and Foundation Company, Inc. His duties were not principally executive. A large part of his regular duties brought him within the regular hazard of the business. When hurt he was

doing the thing which he was called upon to do day after day. While the relationship between him and the officers of the company might be expected to prevent him from being summarily dismissed from the employment, there was no *legal* reason why he should not have been dismissed at any moment the same as any other employee. Legally there is no similarity between the relation which Mr. Bowne, as a stockholder and officer, bore to his company and that which claimant here bore to the National Excavating and Foundation Company, Inc.

I think the motion to discontinue awards must be denied and the case put on the calendar for consideration of future disability.

On August 14, 1917, the Commission denied the motion to discontinue awards in this case, pursuant to the foregoing opinion.

In the Matter of the Claim of MARTIN CRAWFORD, for Compensation under the Workmen's Compensation Law, against New YORK CONSOLIDATED RAILROAD COMPANY, Self Insured

Death File No. 874

(Decided September 5, 1917)

Rehearing granted to determine wages of deceased and what relatives were dependent upon him,

Certain brothers and sisters of deceased, minors, filed through their representatives claims based upon their dependency upon deceased. These claims were in addition to those made by parents. Results of exhaustive investigation of the facts stated in the opinion. Claims in behalf of Francis, Ruth and Arthur Crawford as dependents, previously disallowed, held to be proper; the former disallowance set aside and awards made.

This case came on for rehearing upon two questions only, namely, the average wages of the employee, and the question of dependency of the father and brothers and sisters. Upon the rehearing the Commission determined the average weekly wages to be fifteen dollars and ninety-six cents and an award of 15 per

[Vol. 14]

State Industrial Commission

cent of that amount is made to the mother who has heretofore been decided to be a dependent. The Commission also determined upon the rehearing that the father could not be considered as dependent and therefore his claim was disallowed.

Claimants in person.

M. B. Hoffman, for employer.

SAYER, Commissioner.—The only question referred to me is as to the dependency of certain of the brothers and sisters of the deceased. In addition to claims by the father and mother, claims have been filed by the following brothers and sisters of the deceased employee: Charles Crawford, brother, aged fifteen at the time of the employee's death; Francis X. Crawford, brother, aged twelve; and Ruth and Arthur Crawford, twin brother and sister of the deceased, both aged eight years. As has been found by the Commission, the average weekly wages of the deceased were fifteen dollars and ninety-six cents. From the testimony it appears that the deceased turned over all of his earnings to his mother and received from her such spending money as was necessary. It is impossible from the evidence to ascertain the definite sum of the contributions of the deceased. From the evidence it is fair to assume that they amounted to about ten dollars a week. Deceased's father also contributed his earnings which were from fifteen dollars to twenty dollars per week when he worked, less such spending money as he required. There was an older brother named Harry who also worked, but he seems not to have been under much control and his contributions to the family were practically negligible, it appearing that at times his mother was obliged to give Harry money out of the general family fund. A sister almost eighteen years of age also worked for a time, but at the time of the hearing was in poor health and unable to work. No claim is made on account of the dependency for this older sister but it is fair to assume that she did not bring in any support to the general family fund. In addition to this the father owns the house in which the family lives in the borough of Queens, New York

city. The house he states is valued at about \$5,500 and it is mortgaged for something like \$3,600, there being a first and second mortgage and a third instalment mortgage upon it. The father's equity in the home is therefore very slight while he has undoubted heavy payments to meet for interest and taxes as well as instalments on account of the purchase price. Charles, the fifteen year old brother, seems since to have obtained his working papers, but has no job so far as the evidence discloses. Certainly at this time he is able to and should do some work. I do not think he could fairly be considered a dependent of his older brother. The children, Francis, aged twelve, and Ruth and Arthur, aged eight, are in school and cannot work. They must be properly supported and in my view of the evidence were in considerable measure dependent for their support upon the earnings of their deceased brother, Martin Crawford. The claims on behalf of Francis, Ruth and Arthur should therefore be allowed.

I therefore advise that the application for rehearing on behalf of Francis, Ruth and Arthur Crawford be granted, the previous disallowance of their claims set aside and an award made for each of these three infant brothers and sisters of the deceased.

On this 5th day of September, 1917, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of GEORGE BOSLEE, for Compensation under the Workmen's Compensation Law, against SEMON BACHE & Co., Employer; TRAVELERS' INSURANCE COMPANY, Insurance Carrier

Case No. 1565

(Decided September 5, 1917)

Injuries sustained by George Boslee while employed in a looking-glass factory by Semon Bache & Co.

In July, 1916, the claimant, while handling glass in his employer's factory, cut his hand and in the factory laboratory had his wound

treated with peroxide and bound up. He continued his work, however, for about two weeks. A solution of mercury is used in making mirrors, this solution being poured over the surface of the glass. Necessarily some of the solution gets upon the workmen's hands. Claimant had worked in this factory about seven years but, until the accident, had sustained no ill effects. Soon after the accident, however, mercurial poisoning appeared and left claimant in a serious condition. The Commission called attention to the fact that under the cases, even if the claimant had been absorbing mercury for years before the accident, the lighting up and activation of his condition by the accident brought the case within the statute. An award was made.

The claimant had been in the employ of Semon Bache & Co. for about seven years. The business of the employer is manufacturing and dealing in glass, particularly looking-glass.

The claimant states that about the middle of July, 1916, a glass which he was handling broke, cutting the palm of his hand. He went to the laboratory of the employer where his hand was dressed with peroxide and bandaged and continued working for the balance of the month.

It seems that in making the mirrors a solution of mercury is prepared which the employee is expected to pour over the surface of the glass and the evidence is that this liquid runs over and gets upon the hands. The claimant testifies that for a considerable period of the time the bandage on his hand was wet with this solution.

On or about the thirty-first of July he cut the end of his finger when handling another glass. At this time he had begun to complain of feeling dizzy and nauseated and in bad condition generally. He consulted Dr. Howell about July thirty-first, or August first, and the physician found that wound on the hand nearly healed, but having a scab. The doctor treated him for neuritis and states that the claimant's hands and feet were both badly infected and the skin was peeling off in large flakes. The claimant says the eruptions on his hands and feet were watery and looked like blisters.

The question to be decided is whether the claimant's condition, which is concededly rather dangerous, is due to the accident, or whether it is rather to be attributed to an occupational disease.

Geo. J. Rhodius, for claimant.

J. Quinn, for insurance carrier.

LYON, Commissioner.—It seems to be the opinion of the physicians that the claimant's condition is clearly due to mercurial poisoning. The claimant states, and in this he is supported by his wife, that until the time of his accident he had received no bad effects from working with the mercury, that is, he had not been disabled from that cause.

It is quite clear from the evidence, that from the time of his injury in July he began to be very seriously affected and very shortly became unable to perform his duties. The doctor who first treated him is of the opinion that while he may have been affected with mercurial poisoning to some extent before his accident, still the accident and the subsequent handling of the mercury in the way already stated caused a sufficient immediate absorption of mercury into his system to have produced, in conjunction with the mercury which may have been absorbed by him during the process of his employment through the years, the condition in which the claimant found himself on the thirty-first day of July, and which continues with more or less severity to the present time.

If this be the fact, and from reading the whole record it appears to me to be the most plausible theory to be spelled out of the case, it seems to me that the case is compensatable following a long line of decisions to the effect that where the previously diseased condition is lighted up and activated by an accidental injury, the subsequent disability is to be attributed to the accident within the meaning of the Compensation Law and the case is compensatable, and I therefore advise an award.

On the 5th day of September, 1917, the Commission acted upon the foregoing matter in accordance with the foregoing opinion.

[Vol. 14]

State Industrial Commission

In the Matter of the Claim of EDWARD CASTERLINE, for Compensation under the Workmen's Compensation Law, against JAMES P. GILLEN, Employer; FIDELITY AND CASUALTY COMPANY, Insurance Carrier

File No. 2795

(Decided September 5, 1917)

Injuries sustained by Edward Casterline while employed as a driver and general handy man in a coal and wood yard by James P. Gillen.

On April 19, 1916, the claimant, Edward Casterline, who was a driver and general utility man in a wood yard operated by his employer, backed his wagon into the yard for the purpose of loading it with split wood. The claimant himself did the splitting. While so engaged a stick of wood flew up and struck him in the right eye, ultimately causing him the loss of practically the entire vision of that eye. The injury was held to have been sustained within the line of the duties of claimant as the order he was filling was for split wood and there being an insufficient amount it devolved upon him to prepare it. An award was made.

The claimant herein, Edward Casterline, while in the employ of James P. Gillen, received an injury to his right eye, causing a loss of practically the entire vision of the same. Claimant was employed as a driver and general handy man in the coal and wood yard operated by the employer. It was his business to load coal or wood on his wagon and deliver the same to customers of the employer. On the late afternoon of April 19, 1916, employee backed his wagon with the horse hitched thereto into the wood yard for the purpose of placing thereon a load of split wood. The employee was splitting wood at a chopping block and loading it into the wagon. While engaged in this operation, a stick of wood flew up and struck him in the right eye, causing the injury and subsequent disability.

While chopping the wood, some of the pieces fell to the ground and some fell into a basket, while another piece would remain in the employee's hand, and that piece the employee would throw in the wagon. When a sufficient quantity of the wood had

accumulated in the basket or on the ground, it was picked up and thrown into the wagon.

Robert W. Bonynge, counsel to State Industrial Commission.

Nadal, Jones & Nowton (Charles S. Gray, of counsel, for employer and insurance carrier.

Brennan, Curran & Bleakley (William A. Feuchs, of counsel), for claimant.

SAYER, Commissioner.—The Commission is called upon to determine in this case the question whether or not the accidental injury of the claimant arose out of and in the course of his employment in a hazardous employment under the law. The accident occurred prior to the taking effect of the amendment of the law under which coal and wood yards were included in the hazardous businesses. The test, therefore, is not whether the business of the employer is hazardous under the law, but whether the work which the employee was engaged in doing was hazardous within the meaning of the law. The employee was employed as a driver and handy man about the yard. When engaged in driving a wagon his employment was unquestionably covered by the Compensation Law, group 41 providing that employees engaged in the operation on streets, highways or elsewhere, of trucks, wagons or other vehicles, are engaged in hazardous work. The splitting of wood was not included as a hazardous employment within the meaning of the law. The question to determine, therefore, is whether the work the employee was actually doing was primarily the splitting of wood or loading wagon. The Court of Appeals has held that the loading or unloading of the wagon was incidental to the operation of a vehicle within the meaning of group 41. *Dale v. Saunders*, 218 N. Y. 59. In that case the employee, Dale, was engaged in loading a wagon at a sand pit, when the sand bank fell in and crushed him against the wagon, causing injuries from which he died the same day. The court in its opinion said: "Dale was working for Saunders & Brothers

as a teamster when he met the accident that caused his death. He was engaged in teaming, not in 'the operation of a sand pit' * * * The duties of a teamster properly include the loading of his wagon, and are not limited to the driving of the team (Matter of Costello v. Taylor, 217 N. Y. 179)."

In the case of Costello v. Taylor, 217 N. Y. 179, the Court of Appeals said: "It is the *business of operating wagons* drawn by horses that is intended to be covered by the Act, and not the mere steering of a wagon or handling the reins while driving a horse attached to a wagon." In that case the court held a mere stableman to be covered within the meaning of group 41 of the law, although he performed no duty in connection with the actual driving of the wagon.

Our attention has been called to Matter of Glatzl v. Stumpp, 220 N. Y. 71, as authority for denying this award. It seems to me, however, that the facts in the Glatzl case were distinctly different. In that case the employee, employed by a florist as a driver, had made a delivery, and after such delivery was complete, the employee had, at the request of the customer, gone up a ladder to place a box of flowers which he had delivered in position on the window-sill and in so doing met with an accident. The court found in that case that there was no connection between the driving of the delivery wagon by Glatzl and his falling from the ladder which resulted in his death. The court in that case said: "In order to charge the employer with the liability under the Workmen's Compensation Law, the court must be able to see that the hazards which accompany the duties of the employee have turned against him to his loss and damage." In this case, however, there was a direct connection between the hazard out of which the employee's injury arose and his employment as a driver. It was necessary and part of his duty to load his wagon with the material which his employer directed him to load. In this case it was split wood. There being an insufficient quantity of wood ready split, it was his business to assist in splitting a sufficient quantity of wood to make up his load.

The work in which the employee was engaged was fairly

incidental to the operation of a vehicle and was, in my opinion, covered by the Compensation Law.

It accordingly follows that an award must be made.

On the 5th day of September 1917, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of ABRAHAM COOPERSMITH, for Compensation under the Workmen's Compensation Law, against SILVERSTEIN & WALLIN, Employer; GLOBE INDEMNITY COMPANY, Insurance Carrier

Case No. 8886

(Decided September 5, 1917)

Injuries sustained by Abraham Coopersmith while employed by Silverstein & Wallin in the city of New York, the question involved herein relating solely to the status of the insurance policies at the time of the accident.

The injury complained of occurred on January 29, 1917, and the employer claims to be covered by a policy issued by the Globe Indemnity Company to it on the 15th day of March, 1916, for a period of one year. This policy was negotiated in their behalf through Patrick J. Hanley, an insurance broker of the city of New York, as well as various other policies of insurance. The firm of Silverstein & Wallin failed to pay Hanley the amount advanced by him for premiums and on September 29, 1916, he wrote requesting immediate payment or a surrender of the policies for cancellation. On October fifth the policy in question was returned to Hanley, together with certain other policies that had been procured for the same firm. The employer insists that there was no legal cancellation of these policies because the cancellation did not follow the directions outlined in subdivision 5 of section 54 of the Workmen's Compensation Law. The subdivision in question, however, provides that no contract of insurance issued against liability under this statute shall be canceled until at least ten days after notice of cancellation shall have been filed in the office of the Commission and also served on the employer. *Held*, that it was the intent of the Legislature to safeguard by this subdivision the interests of an employer. Where, however, the employer himself makes application for cancellation there is no reason for the insurance carrier to still give the employer ten days' notice since that would be only to notify him of his own actions in

the matter. Under all the circumstances of this case the policy was canceled as regards the insurance company and the insurer not only acquiesced in the cancellation but had adequate and repeated notice that it was uninsured from the date of cancellation. Award made as against the employer but refused as against the Globe Indemnity Company.

The question to be determined here is whether the employer at the time of the claimant's injury on January 29, 1917, was covered by the Globe Indemnity Company's policy of insurance, No. 410505, issued to it on the 15th day of March, 1916, and to run for one year.

Patrick J. Hanley of 1 Liberty street, New York city, is an insurance broker and acted in the procuring of the policy in question. In addition to the workmen's compensation policy in question here, he had procured for the firm of Silverstein & Wallin various other policies of insurance and received on account of the premiums on all the policies a check, but not sufficient to pay the premiums in full, although the check was more than the premium on the compensation policy here under consideration.

On September 29, 1916, Hanley wrote the firm calling attention to their neglect to forward a check for the balance of premiums due and concluded his letter with the following: "Unless you can favor me with your check for this amount by return mail, please return the policies to me that were issued for your account, so that they may be surrendered to the Companies, for cancellation."

Not receiving the check, he wrote them again on October fourth, as follows: "Following conversation over the 'phone this a. m. must ask you to hand bearer all policies issued by this office, as you promised this morning to do. An adjustment will be made on your account and whatever balance is due you will be returned. I expect that there will be no further controversy in this matter and that the policies will be turned over and you will arrange for your insurance elsewhere."

On October fifth, the policy in question here with other policies was returned to Hanley and he wrote the firm on October sixth,

as follows: "I acknowledge receipt of the following policies which are being returned to the Companies for cancellation, as per my letter to you of October 5th.

Ætna	#641096	expired.
Prov. Wash.	265325	
Ætna	642503	
Nat'l. Surety	738123	
Ætna	639471	expired.
Westchester	698341	
Globe	410515	
Ætna	639372	

"Any adjustment that may be due you will be made as soon as this matter is straightened out with the Companies. In the meantime, you are without insurance and I would suggest that you make other arrangements."

The policy mentioned in the foregoing letter, "Globe No. 410515," is the policy in question here, the mistake in the number of the policy apparently being that of the writer of the letter.

On October 7, 1916, Hanley again wrote to the firm, as follows: "I wish to confirm my letter of Oct. 6th by registered mail, so that there may be no misunderstanding on your part that the following policies have been cancelled, as was thoroughly explained to you by 'phone and in my letter of October 5th.

Prov. Wash.	#265325
Ætna	642530
Nat'l. Surety	738123
Ætna	639372
Westchester	698341
Globe	410515

"This leaves you without any insurance at any location that was formerly covered through this office, as all the policies are being returned to the Companies for cancellation and would suggest that you make arrangements to cover yourselves elsewhere."

On October sixteenth Hanley again wrote the firm, in part, as follows: "Enclosed herewith please find check of \$1.61 being the

return premium due you on policies that were cancelled as per the accompanying statement. There is no return premium due you on Policy No. 410515 of the Globe Indemnity Co., until the Company audits your books for the year, and ascertains whatever the payroll may be. * * * This winds up our business relations and, as was explained to you in my two previous letters that we sent you recently, there is no insurance in force for you as far as this office is concerned."

The company, in pursuance of the surrender of the policy, canceled it on the 13th day of October, 1916, as appears by its records, and on the 10th day of February, 1917, returned to the insured its draft for two dollars and forty-three cents, being the unearned portion of the premium. The only question to be decided is, whether the proceedings already recited amounted to the valid cancellation of the policy.

David Kornbluh, for claimant.

Robt. M. McCormick (Jos. J. Murray of counsel), for insurance carrier.

LYON, Commissioner.—It is insisted by the employer that the policy in question here was not legally canceled, because the cancellation did not follow the directions outlined in subdivision 5 of section 54 of the Workmen's Compensation Law. This contention in my opinion is not sound. The provision of that subdivision relative to cancellation is as follows:

"5. Cancellation of Insurance Contracts.—No contract of insurance issued by an insurance carrier against liability arising under this chapter shall be cancelled within the time limited in such contract for its expiration until at least 10 days after a notice of cancellation of such contract, on a date specified in such notice, shall be filed in the office of the commission and also served on the employer."

I do not think this provision of the law is intended to have any application to the cancellation of a policy of insurance at the instance of the insured. It was manifestly the intent of the Legislature to safeguard the rights of an employer and perhaps

through him of the employee against the cancellation of the insurance contract without due notice and an opportunity on the part of the employer to place his insurance elsewhere. Where, however, the employer makes an application to have the policy canceled, there seems to be no reason for the insurance carrier to still give the employer the ten days' notice, since that would be only to give him notice of his own action in the matter.

In the absence of a provision in the statute preventing it, I take it that either party to a contract of insurance may move to have it canceled at any time. In line with this theory the policy in question contained a cancellation provision as follows: "This policy may be cancelled by either party upon 10 days' notice to the other stating when thereafter cancellation shall be effective, and the date of cancellation shall then be the end of the policy term. * * * If such cancellation is at the company's request, or at the employer's request when actually retiring from the business herein described, the earned premium shall be computed as provided in Condition A, and adjusted *pro rata*. If such cancellation is at the employer's request and he is not retiring from the business herein described, the earned premium shall be computed and adjusted at short rates in accordance with the table printed hereon, but such short rate premium shall not be less than the minimum premium stated in said declarations."

It is admitted by all parties that the broker in this case was the agent of the assured. The attorney for the assured makes some question about the authority of the broker to act as agent in the cancellation of the policies, but this question in my view of the matter is not of great importance. The record does not show why the broker wished to have the policies canceled. It is quite probable that he had extended credit to the insured for so long a period that under his contract with the insurance carrier he had made himself liable for the premiums. Whatever his motive, it is undisputed that he requested a return of all the policies to him for the purpose of cancellation and that the assured returned the policy for that purpose and that the policies so returned to the broker were sent to the insurance company for the purpose of being

[Vol. 14]

State Industrial Commission

canceled and that they were actually canceled. I think by this action the assured clearly waived any right which they might have had to insist on the ten days' notice required by subdivision 5 of section 54. Perhaps it should be said that instead of waiving that notice they became the movers in having the policies canceled, since they were instrumental in having them returned to the company for cancellation and that too by the hand of the very broker through whom they were secured.

That the small return premium was not made until after the accident is not controlling, to my mind, since it was necessary that there should be a pay-roll audit before a proper return of premium could be had. I am, however, clearly of the opinion that the policy was canceled as claimed by the insurance company and it is perfectly evident from the correspondence in the case that the insured not only acquiesced in the cancellation, but had adequate and repeated notice that they were uninsured from the date of the cancellation.

I, therefore, advise an award against the employer, and that an award be denied as against the Globe Indemnity Company.

On the 5th day of September, 1917, the Commission acted upon the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of ANNIE DALY, for Compensation under the Workmen's Compensation Law, against BATES & ROBERTS, Employers; FRANKFORT GENERAL INSURANCE COMPANY, Insurance Carrier

Case No. 45382

(Decided September 5, 1917)

Injuries sustained by Annie Daly while employed as a laundry worker by Bates & Roberts, hotel proprietors, in the city of New York.

On March 12, 1917, the claimant, Annie Daley, was employed at the Murray Hill Hotel in the city of New York by Bates & Roberts, the proprietors, as a laundry worker in the laundry connected with the

hotel, and having finished her regular work went to the laundry to do her own washing. The hotel maintains a power laundry where the work of the hotel is done and claimant, in connection with her duties in this department, received for compensation a certain sum in money, her board and her room, and was also allowed to make use of the laundry after the regular hotel work was done for the purpose of washing and doing up her own clothing. On the evening in question the claimant in preparing to use the power machine in the laundry was thrown to the floor by the machine and sustained a fracture of her left wrist. The question here is as to whether the insurance carrier is correct in its contention that the laundry in this case was not being carried on for pecuniary gain and that hence the accident herein does not come within the statute. The Commission ruled the point not well taken. The Commission has repeatedly held that an employer conducting a non-hazardous business may still have some portion of the business which is hazardous and which must be covered by compensation insurance. In the present case, in the keeping of a large hotel in New York city it is almost necessary to conduct a laundry department as a regular part of its establishment. As a worker within this department the claimant was clearly within the scope of the Compensation Law. An award was made.

Bates & Roberts, the employers in this proceeding, maintained and operated the Murray Hill Hotel in the city of New York. As a part of the operation of said hotel, the employers maintain and operate a power laundry where the laundry of the hotel is cared for and the claimant was an employee in the laundry. She received for her compensation a certain stipulated wage in money and in addition thereto her board and a room where she lodged, and in conjunction with her room and work, she, as well as other employees of the hotel, were allowed to use the laundry after the work of the hotel was done, for the purpose of washing and doing up their own clothing.

On March 12, 1917, the claimant had finished her regular work for the hotel in the laundry and went, as the custom was, in the early part of the evening into the laundry to do her own washing. The laundry contains a power machine, which the claimant calls a barrel, consisting of a revolving apparatus in which there is a rack called the "horse," upon which the laundry articles are hung for drying purposes. In attempting to pull this horse out of the barrel, so as to make use of it for her purposes, the claimant was thrown to the floor and sustained a fracture of her left wrist.

Compensation is resisted on the ground that the laundry was not being used by the employer for pecuniary gain and on the further ground that, in any event, the accident did not arise out of and in the course of employment.

Robert W. Bonyng, counsel to State Industrial Commission.

Claimant in person.

Frank K. Willmann, for insurance carrier.

William A. Jones, Jr., for employer and insurance carrier.

LYON, Commissioner.—The insurance carrier relies on the case of *Mihm v. Hussey* and kindred cases for the proposition that the laundry in this case was not being carried on for pecuniary gain. I do not think the point is well taken. The Commission has repeatedly held that an employer whose general business is not hazardous may still have some portion of the business which is hazardous and which must be covered by compensation insurance, and in this finding the courts have acquiesced.

For example, an ordinary department store would not be held to be under the Compensation Law, but awards for injuries to employees of such stores who are injured while operating vehicles, in conjunction with delivery, have been sustained, and generally the Commission has made awards to employees who are injured in the business of an employer whose principal business is not hazardous, but who regularly operates a hazardous industry in conjunction with the non-hazardous business.

In the present case, I think it is beyond argument that a large city hotel, in order to properly care for the cleanliness of its table and bed linen and the needs of its guests in the way of bathing facilities, almost necessarily operates as part of its plant a power laundry. The cases of *Mihm v. Hussey* and *Bargey v. Massaro Macaroni Company* are not to the contrary.

In the *Mihm* case the court held that a dealer in vinegar, who

was simply storing his own product in his own store, or storage place, was not carrying on a storage business.

In the Bargey case it was simply held that a macaroni company who called in a carpenter to remove a partition was not engaged in the carpentry business for pecuniary gain. Had the company on the contrary been engaged in the business which necessarily called for the continuous services of a corps of carpenters, the decision would undoubtedly have been to the contrary.

As previously stated it seems to me to be evident that a large hotel in the city of New York almost necessarily keeps a laundry department as a regular part of its establishment. In any event, the proofs are that such was the fact in this case, and I think the laundry work done in the Murray Hill Hotel's laundry falls under the Compensation Law.

The question whether the accident arose out of and in the course of the claimant's employment is not altogether easy to determine. It will be noticed, however, that the plaintiff's wage return consisted of several items: a money consideration, board and lodging and an opportunity to use the plant of the employer in doing the claimant's own laundry work. I suppose it goes without saying that such an employee is under just as much necessity, under modern conditions, to have her laundry work properly attended to, in order to make herself presentable, as she is to wear suitable clothing, and it seems to me that in carrying out this provision of the contract the plaintiff might be held in some sense to be working out her own payment for her labor. If she had been injured while doing her work, at the instance of her employer, for other employees of the hotel, there would probably be no question but that she was in the course of her employment, as much as though she had been doing work for the hotel proper, and I am not able to distinguish such a case from the case where, as part of her regular employment, she is engaged in doing her own laundry work. The case seems to be somewhat analogous to the case where an employee, after business hours, goes to his employer's premises for the purpose of collecting wages and receives an injury. In

these cases I think it is usually held that the accident arose out of and in the course of employment.

In the case of *Lowry v. Sheffield Coal Co.*, 24 Times L. R. 142, it was held that an injury to a servant, who several hours after he had left work on Saturday morning, went to the pay office as he was required to get his wages, was occasioned in the course of his employment.

In the case of *Riley v. Holland*, 4 B. W. C. C. 155, where the applicant who had been discharged from a mill, went to the mill two days after, upon a regular pay day to get her pay and was injured on her way down the stairs from the pay office, it was held that the accident arose out of and in the course of her employment. The court in that case quoted the following from the case of *Holness v. Mackay*, 2 Q. B. 319: "Though the employment is at an end in the sense that the workman (whether rightly or wrongly) has ceased to work under the contract, yet the employment may continue, because of an obligation of the employer to the workman arising out of the course of employment and continuing at the time of the occurrence of the accident."

The claimant certainly was within her rights and within the terms of her employment when she entered the laundry for the purpose of doing her own washing. She was subjected, as the employer well knew, to all the hazards of that employment and I think she was doing work which clearly entered into her contract of employment, and I advise that an award be made.

On the 5th day of September, 1917, the Commission acted upon the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of MARY LANIGAN, Widow, for Compensation under the Workmen's Compensation Law, for the Death of JAMES F. LANIGAN, against STANDARD SHIPBUILDING CORPORATION, Employer; ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier

Case No. 22545

In the Matter of the Claim of NORA MORAN, Widow, for Compensation under the Workmen's Compensation Law, for the Death of MARTIN MORAN, against INTERNATIONAL ELEVATING COMPANY, Employer; GLOBE INDEMNITY COMPANY, Insurance Carrier

Case No. 21601

In the Matter of the Claim of SUSAN CHAMPION, Mother, for Compensation under the Workmen's Compensation Law, for the Death of HAROLD RAY EFFINGHAM, against NEW YORK AND NEW JERSEY STEAMBOAT COMPANY, Employer; EMPLOYERS' LIABILITY ASSURANCE CORPORATION, Insurance Carrier

Case No. 820

In the Matter of the Claim of JAMES SHANLEY, for Compensation under the Workmen's Compensation Law, against AMERICAN SUGAR REFINING COMPANY, Employer; EMPLOYERS' LIABILITY ASSURANCE CORPORATION, Insurance Carrier

Case No. 32162

(Decided September 11, 1917)

Injuries in four distinct cases, three of which involved the death of James F. Lanigan, Martin Moran and Harold Ray Effingham respectively, and the fourth a fracture of the right tibia of James Shanley, said cases being each against a different corporation but considered together as related to the same principle.

The facts in the several cases considered were respectively as follows:
In the Lanigan case, brought by the widow of James F. Lanigan for her-

self and minor children, the claim is for injuries, resulting in the death of Lanigan on October 21, 1916, while engaged in the repair of a vessel on dry dock by the Standard Shipbuilding Corporation.

In the Moran case, brought by the widow of Martin Moran, for herself and minor children, the claim is for injuries, resulting in the death of Moran on August 21, 1916, while in the employ of the International Elevating Company, a New Jersey corporation having its principal office in the city of New York. Moran was killed by falling from one of the vessels of his employer at pier 58, New York city.

In the Champion case, brought by the mother of Harold Ray Effingham, the claim is for injuries resulting in the death of Effingham. On December 20, 1915, the deceased, while employed as a helper in loading a vessel owned by the New York and New Jersey Steamboat Company, was pulling a case with a cotton hook when the hook slipped and he fell overboard and disappeared. The body was not recovered.

In the Shanley case, the action was brought for personal injuries sustained by the claimant on the 22d of September, 1915, while employed as a longshoreman for the American Sugar Refining Company. In crossing a gangplank he was struck by a draft of raw sugar bags and thrown to the dock, resulting in the fracture of the right tibia.

These four cases all involved the question as to whether they related respectively to the doctrine of admiralty. They were all decided by the Commission prior to the decisions of the United States Supreme Court, handed down on May 21, 1917, that the cases known as the Jansen and Walker cases were within the exclusive cognizance of admiralty. While these cases differ from one another in some important particulars they still have certain features in common. *Held*, that they be dealt with together, so that all the questions raised in these cases, because of the United States Supreme Court decisions, may be brought before the court on appeal at the same time. *Held*, also, that the insurance carriers got certain advantages, or at least the claimants suffered certain disadvantages, from the adjustments, which make it inequitable to now reverse the action of the Commission; that such action in the three death cases be adhered to as well as our approval of the agreement by the parties in the Shanley case, and that the same be made effective as it is of great importance for the future guidance of the Commission that the questions be reviewed by the courts and a contrary decision would place the burden of an appeal upon the claimants who, in all probability, would be compelled, through their lack of means, to acquiesce in the decision of the Commission.

The necessity for further hearings in these cases grows out of the decisions of the United States Supreme Court in the Jansen and Walker cases, which were handed down on May 21, 1917. The Jansen and Walker cases were held by the United States Supreme Court to be within the exclusive cognizance of admiralty,

the accident in one of them having happened on board a ship, and in the other on the gang plank running from the dock to the ship. The Commission had made awards in both cases which had been affirmed both by the Appellate Division of the Third Department of the Supreme Court and by our Court of Appeals. The present cases were decided by the Commission prior to the United States Supreme Court decisions and all parties acquiesced in the awards made by the Commission.

While the cases differ from each other in some important particulars, they still have certain features in common, and it seems best that they be dealt with together, so that all the questions raised in these cases, because of the United States Supreme Court decisions, may be brought before the court on appeal at the same time.

In the Lanigan case, claim is made by the widow of James F. Lanigan on behalf of herself and minor children for death benefits growing out of the death of the said James F. Lanigan on October 21, 1916. Mr. Lanigan was engaged in the repair of a vessel owned by a third party, but being repaired by the Standard Shipbuilding Corporation on its marine railway. By means of the railway, which extends from the land into the water, the ship upon which Lanigan was working was drawn out of the water and he received the accident from which he died while working upon the ship so drawn out of the water. The claim for compensation was filed with the Commission on November fourteenth, and thereafter an award was made on December eighth, by which the employer and insurance carrier were directed to pay the sum of forty-nine dollars and thirty-two cents for compensation down to November twenty-sixth and thereafter at the rate of nine dollars and eighty-six and one-half cents weekly, "periodically in accordance with the method of the payment of wages to employees at the time of death." This award was subsequently paid, and on December ninth the insurance carrier mailed Mrs. Lanigan another check for thirty-nine dollars and forty-four cents, "covering four weeks' compensation from November 25th to December 23rd, on account of yourself

[Vol. 14]

State Industrial Commission

and children." The letter further stated, "if you will sign the draft on the back and front in the places marked 'X' you can have same cashed the same as any other draft and we will continue to send you drafts every four weeks for the same amount as long as you are entitled to the same." Thereafter, drafts for thirty-nine dollars and forty-six cents were sent to the claimant on January ninth, on February third, on March second, on March twenty-ninth, on April twenty-fifth and on May twenty-fourth, the latter draft covering compensation down to June 9, 1917, since which time no payments have been made, the insurance carrier taking the position that after the decision of the United States Supreme Court in the Jansen and Walker cases, the Commission has no jurisdiction over the matter and that no further payments can be compelled. No appeal from the Commission's decision has been taken and the time to appeal therefrom has long since expired.

In the Moran case, the claim is made by the widow of Martin Moran on behalf of herself and minor children for death benefits growing out of his death on August 21, 1916, as the result of an injury received that day while in the employ of the International Elevating Company, a New Jersey corporation having its principal office in the city of New York. Mr. Moran lost his life by falling from one of the vessels of his employer at Pier 58, New York city. A claim for compensation was seasonably made and came on for hearing before the Commission when both employer and insurance carrier appeared and made no objection to the granting of an award. On December 8, 1916, a notice of an award was duly served on the employer and insurance carrier, stating that an award had been made on November 24, 1916, and after specifying the method of arriving at the rate of compensation, the notice contained the following: "The employer is hereby directed in accordance with the provisions of the Workmen's Compensation Law to pay the above award in the following manner, to Mrs. Nora Moran, No. 85 First place, Brooklyn, N. Y., in sums, as follows: \$129.25 at once for period from August 21, 1916, to November 27, 1916, and thereafter \$9.23 per week,

periodically in accordance with the method of payment of wages to employees at the time of injury or death." An additional award was subsequently made, owing to the birth of another child, and upon the hearing on that occasion no objection was made. Compensation was paid by various checks down to and including June 11, 1917, the last check being mailed after the decision in the Jansen and Walker cases. No appeal from the Commission's decision has been taken and the time to appeal has expired.

In the Champion case, claim is made by the mother of Harold Ray Effingham for death benefits growing out of his death on December 20, 1915. The employer in his first report of injury describes the accident as follows: "Deceased was helping to load cases on board the steam lighter, 'James W. Walsh' of New York. He was using a cotton hook to pull some cases off and in pulling one the hook slipped and he fell overboard and disappeared. One of the men dove overboard but was unable to locate him. Body has not been recovered." While the accident happened in New Jersey the record shows that the deceased was employed in the State of New York. No objection was raised on the hearing of the claim by either the employer or the insurance carrier, and on April 21, 1916, a notice of the award made on April nineteenth was duly served on all parties and contained, among other things, the following: "The employer is hereby directed in accordance with the provisions of the Workmen's Compensation Law to pay the above award in the following manner: To Mrs. Susan Champion, 586 East 29th street, Brooklyn, N. Y., in sums, as follows: \$43.56 at once for the period from December 20th, 1915, to April 24th, 1916, and thereafter \$2.42 per week periodically in accordance with the method of payment of wages to the employees at the time of injury or death." In pursuance of this award, compensation was paid until the decision in the Jansen and Walker cases. No appeal was taken and the time to appeal has expired.

In the Shanley case, Mr. Shanley was injured on the 22d day of September, 1915, and thereafter an agreement was, on the 25th day of October, 1915, made between him and the American Sugar

[Vol. 14]

State Industrial Commission

Refining Company, which recites that the accident happened at "South 4th street & Kent avenue; nature of injury — fractured right tibia; how accident happened — struck by draft of raw sugar bags and thrown to dock; occupation of injured employee — long-shoreman; what was employee doing at time of injury — crossing gangway of steamer." This agreement was duly submitted to the Commission for its approval and was duly approved by the Commission on October 25, 1915, and notice of such approval was sent to all parties. Awards were paid, in pursuance of said agreement, as approved, down to approximately the date of the decision of the Jansen and Walker cases.

Jeremiah F. Connor, for claimant in Lanigan and Moran cases.

Mrs. Champion, claimant in person.

Mr. Shanley, claimant in person.

T. Carlyle Jones, for Ætna Life Insurance Company.

Joseph Murray, for Globe Indemnity Company.

W. L. Tufts, appearing specially for the Employers' Liability Assurance Corporation.

LYON, Commissioner.— It is doubtful whether the decisions in the Jansen and Walker cases have any application to the Lanigan proceeding. The deceased in this case was working upon a vessel which was drawn out upon the land which was not technically upon navigable water at all. It is well settled that a dry dock itself is not a subject of maritime jurisdiction and that a ship in building and before it is launched is not subject to maritime rules; also that materials furnished to a ship in the process of construction are not covered by maritime rules, even though furnished after the ship is launched. *Iroquois Transportation Company v. Delaney Forge & Iron Company*, 205 U. S. 356. By a parity of reasoning it would seem that when a ship is drawn out

of the water and repaired on land, it ceases to be covered by rules of the sea. If it should appear that the later decisions of the United States Supreme Court are against this proposition, it is still quite probable that the enforcement, in admiralty, of payment for materials or labor furnished in the repair of a ship drawn up upon land, would be confined to an action brought against the ship itself or its owners and that admiralty jurisdiction would not run against an independent contractor who had taken the contract to repair the ship. This seems to be the opinion of our Attorney-General who, after referring to the United States Supreme Court decisions on the point, concludes, as follows: "While therefore a workman who is injured if he elected to proceed against a steamship upon which repairs were being made, would have to proceed in admiralty, if he proceeded against the dry dock company which employed him, his remedy would be under the Workmen's Compensation Law inasmuch as dry docks and floating docks engage in building or repairing ships and are not engaged in a maritime enterprise, and such dry docks are not vessels engaged in navigation. I see no reason therefore why dry dock companies engaged in building or repairing vessels should not be insured in the state fund for their liability under the Workmen's Compensation Law."

Attention is called to the act of Congress passed June 23, 1910 (36 U. S. Stat. at Large, pt. 1, p. 604), which is, in part, as follows:

"Sec. 1. That any person furnishing repairs, supplies, or other necessities, including the use of a dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding *in rem*, and it shall not be necessary to allege or prove that credit was given to the vessel. * * *

"Sec. 5. That this Act shall supersede the provisions of all state statutes conferring liens on vessels in so far as the same purport to create rights of action to be enforced by proceedings *in rem* against vessels for repairs, supplies and other necessities."

In the case of *The Alliance*, 236 Fed. Rep. 361, the court in construing this statute said:

"Whatever may have been the rule prior to the Act June 23, 1910, in reference to the use of marine railways, as that Act gives a maritime lien to one who furnishes a dry dock or marine railway for the repair of a vessel, I am of the opinion that a contract regarding the use of such dock or railway for such repairs is a contract cognizable in the admiralty."

A statute or an amendment to a statute which ostensibly gives a new right or broadens a field already covered raises a very strong presumption that the right did not previously exist or that the field was before restricted since the Legislature is not supposed to do a vain and needless thing. So held in *Pardy v. Boomhower Grocery Company*, 178 App. Div. 347.

In *Pietha v. Murdther*, 174 App. Div. 764, an amendment to the Compensation Law brought meat markets under the act, and the court said: "And the fact that the Legislature has found it necessary to include meat markets in the list of hazardous occupations clearly shows that it was not a part of the law prior to the enactment of this statute."

It will be noticed that neither the statute nor the opinion just quoted attempts to deal with the relation between a dry dock or marine railway company and its employees. The owner of a dry dock may well be given a lien in admiralty against a ship upon which he puts repairs, while his employees are left to their common-law remedy, and the absence from the statute of all reference to employees would seem to imply that such was the intention. This, too, is in accord with the opinion of the Attorney-General already quoted. The presumption is, as seems to be in "*The Alliance*" that, prior to 1910, even a dry dock or marine railway did not have a maritime lien and, if not, certainly the employee of such a concern did not. Starting then with the proposition that an employee of a dry dock or marine railway did not, prior to 1910, have a right to proceed against his employer in admiralty, we look in vain for anything in the statute quoted conferring such a right and may safely conclude that it does not exist. In

any event, if there be doubt upon the question, I think the Commission should follow the opinion of the Attorney-General.

There is also another ground for not changing the award already made, which is presented to us with a good deal of force, namely, — that of estoppel. It is urged that the employer and insurance carrier have acquiesced in the jurisdiction of this Commission, have recognized their liability under the Compensation Law, have taken no steps to reverse the Commission's award, have repeatedly recognized their liability by making payments, that the last payment was made after the decision of the United States Supreme Court, and that by this acquiescence they have lulled the claimants into security until some of their rights have probably been eliminated by lapse of time and their opportunity to secure the proper evidence for a suit either at common law or in admiralty is gone.

It is also argued that the insurance carrier has been compensated for carrying this risk to maturity by the premiums which it exacted, and that it is taking an unfair advantage, after having exacted premiums which it keeps and which are presumably adequate to carry the risk and furnish a fair profit, to now repudiate the liability for which it has been paid. This argument appeals with considerable force, so far as the business ethics of the situation are concerned. If the case is held to fall under admiralty jurisdiction and the argument that want of jurisdiction renders the Commission's decision null and void *ab initio* can be escaped, and if it is possible for an estoppel to be invoked in such a case, I should be disposed to hold that the insurance carrier is estopped by its repeated acts of affirmance of the Commission's ruling. Of course it is possible for the insurance carrier to apparently justify its action in retaining the premiums paid while repudiating its liability, on the ground that they are now subject to actions either at common law or in admiralty which might result in very large damages against them and that it is not fair to ask them to respond in compensation cases where no negligence is found and not have the benefit of compensation awards in cases where negligence is proven, but I think this argument has something specious about it, because the question of the Commission's jurisdiction over

admiralty cases was raised long ago, and the insurance companies had the right, and undoubtedly exercised it, of fixing the amount of their premiums at a figure which would cover this risk as well as all others.

The time at my disposal has not permitted me to go very carefully into the question of estoppel here presented, but I am disposed to give to the claimants the benefit of the doubt, since to do so works out what seems to me to be justice and only gives another reason for the award, in addition to a finding that the employment of the deceased was covered by the Compensation Law, all the more so, because it is in line with the opinion of the Attorney-General, and makes it possible to have the concededly close questions of law properly reviewed by the court.

The Moran and Champion cases appear to fall within the rules of admiralty, but I am disposed to let the reasoning on the question of estoppel control. In both of these cases, as well as in the Lanigan case, the claim for compensation, in pursuance of section 29 of the Compensation Law, contains the following: "I hereby agree to accept the compensation awarded by the State Workmen's Compensation Commission in lieu of any other right or cause of action which I may have against any person, firm or corporation, in consequence of such accident; and, in consideration of such compensation, if any, when awarded, I hereby assign and set over unto the State Workmen's Compensation Commission, for the benefit of the State Insurance Fund, if compensation be payable therefrom and otherwise to the person or association or corporation liable for the payment of such compensation, all my right, title, and interest, if any, in such cause of action for such injury, loss, or damage against any person, firm or corporation."

Whatever rights the claimants had against any party have been transferred, in each case, pursuant to law, to the insurance carrier. This may be held to be a valid consideration running to the carrier for its acceptance of the Commission's award, and raises another question as to their right to refuse payment of the awards.

In the Shanley case the agreement, approved by the Commission, recites that the claimant and employer "have reached an

agreement in regard to claim for compensation for the injury sustained by said employee, and submit this joint report of such claim and agreement. We agree that facts herein stated are the basis of a claim made and to be paid in strict accordance with the compensation law; and we further agree to the receipt and payment of compensation or death benefit upon the basis of such claim including the amount 'to be paid now' as designated below and such other amounts as may be determined from the nature, extent, duration and result of the injury described herein."

I suppose it will be admitted that parties may agree upon a settlement of a claim, no matter how doubtful it may be either upon the facts or upon the law. Such a settlement will, I think, be found all the more quickly when made while the test of the law is in actual progress, just as a case tried before a jury is often compromised and settled while the jury is deliberating over its verdict.

I think it might fairly be said that these cases were in effect adjusted while the courts were deliberating over the law. The insurance carriers got certain advantages out of, or, at least, the claimants suffered certain disadvantages, from the adjustments which seems to make it inequitable to now reverse our action. I advise that our decisions in the three death cases be adhered to, as well as our approval of the agreement in the Shanley case, and that any steps necessary to make the same effective be taken, all the more so since it is of great importance for our future guidance that the questions be reviewed by the courts and a contrary decision would place the burden of an appeal upon claimants who, in all probability, would be compelled, by their lack of means, to acquiesce in the decision of the Commission.

On the 11th day of September, 1917, the Commission acted upon the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Application of the IRON STEAMBOAT COMPANY OF NEW JERSEY, for the Return to Said Company of Premiums Paid by it into the State Insurance Fund, Less Fifty Dollars, Payments Alleged to Have Been Paid Out of Such State Fund for Compensation to the Employees of Said Company

In the Matter of the Application of the NEW JERSEY NAVIGATION COMPANY, for the Return to Said Company of all Premiums Paid by it into the State Insurance Fund

(Decided September 20, 1917)

Insurance in the State insurance fund is optional but having been taken out policies in such fund cannot be canceled.

These cases were decided together as the same principles applied to each. The Iron Steamboat Company asks for the return to it of premiums paid by it into the State insurance fund less the sum of fifty dollars, which said sum is alleged to have been paid out by the State fund for compensation to employees of the company. The New Jersey Navigation Company asks for the return to it of all premiums paid by it into the State fund. Both of these companies are engaged in running boats upon the navigable waters about New York harbor and neither has any employees, excepting perhaps a very few, who are not engaged in the operation of boats. Both companies insist that the decisions in the Jensen and Walker cases in the United States Supreme Court held that the Workmen's Compensation Law is unconstitutional so far as it seeks to cover employees engaged in the operation of boats. A claim is also made of want of consideration for the premiums paid and that the companies were not covered for their employees under the Compensation Law.

The State insurance fund was brought into existence by the Workmen's Compensation Law passed in 1914, which went into effect, so far as it covered compensation to employees injured in hazardous employment, on July 1, 1914. The fund was "for the purpose of insuring employers against liability under this chapter and of assuring to the persons entitled thereto the compensation provided by this chapter." The statute set forth the provisions under which the fund should be operated. Insurance in the State insurance fund is optional, but having been taken out policies in such fund cannot be canceled. The State Industrial Commission has through the State fund made awards of many thousands of dollars and the State has paid many thousands of dollars

in awards. *Held*, that under these circumstances to comply with the demand of these petitioners would very seriously impair the financial responsibility of the State fund. Application denied.

Application is made by the Iron Steamboat Company for return of premiums paid by it into the State insurance fund less the sum of fifty dollars alleged to have been paid out by the said fund for compensation to the employees of the Iron Steamboat Company.

Application is made by the New Jersey Navigation Company for the return of all premiums by it paid into the State fund.

On or about the 10th day of July, 1914, policies of insurance were issued to these two companies and the premium for the first six months was, in each case, paid. Thereafter, semi-annual premiums were paid to the State fund from time to time, the last payment being made, in the case of the Iron Steamboat Company, on October 10, 1916, and in the case of the New Jersey Navigation Company, on September 26, 1916. In the case of the Iron Steamboat Company, one claim was presented against the State fund under its said policy upon which two awards of fifty dollars each were made and paid. Another claim for an accident which happened in the State of New Jersey has also been presented, partial compensation for which has been paid under the New Jersey law, but the claimant in that proceeding asks for compensation under the New York law, on the ground that he resided and was hired in the State of New York and that he is entitled to the rate of compensation under the New York statute, instead of under the New Jersey statute, the rate in New York being higher than that in New Jersey and the claim being in that respect that he should have the difference between the rate paid under the New Jersey law and the rate payable under the New York statute for the weeks already paid, and payment under the New York statute for the balance of his compensation, which, if payable at all, would amount to 128 weeks for the loss of an eye.

There appear to have been no payments made under the policy issued to the New Jersey Navigation Company. Both companies are engaged in running boats upon the navigable waters about

New York harbor, and neither company has any employees, or at least very few employees, who are not engaged in the operation of the boats. There are two or three employees whose business is the selling and taking up of tickets, but this also is incidental to the running of the boats.

It is the claim of both companies that since the United States Supreme Court in the Jensen and Walker cases held that the Workmen's Compensation Law is unconstitutional, so far as it purports to cover employees engaged in the operation of boats, there was no consideration for the payment of these premiums, that the companies had no coverage for their employees under the Compensation Law, and that the premiums should be returned in the case of the New Jersey Navigation Company, and that a similar return should be made in the case of the Iron Steamboat Company, deducting therefrom the payments actually made by the State insurance fund under its said policy. This is the only question to be determined.

Wingate & Cullen, by Conrad Saxe Keyes, for petitioners.

Robert W. Bonynge, for the State Fund.

LYON, Commissioner.—The Workmen's Compensation Law passed in 1914, went into effect, so far as it covered compensation to employees injured in hazardous employment, on July 1, 1914. That act brought into existence the State insurance fund "for the purpose of insuring employers against liability under this chapter and of assuring to the persons entitled thereto, the compensation provided by this chapter." Section 90 of the act further provided: "Such fund shall consist of all premiums received and paid into the fund, of property and securities acquired by and through the use of moneys belonging to the fund and of interest earned upon moneys belonging to the fund and deposited or invested as herein provided. Such fund shall be administered by the commission without liability on the part of the state beyond the amount of such fund. Such fund shall be applicable to the

payment of losses sustained on account of insurance and to the payment of expenses in the manner provided in this chapter."

The statute provided for the custody of the funds of the State insurance fund, the setting up of surplus and reserves to carry all losses to maturity and generally establishing the State fund as an insurance unit, for the purpose of providing compensation insurance to the employers of the State, who applied for it, at cost. By section 50 of the act it was provided that an employer of labor in the State of New York engaged in one of the hazardous employments enumerated in section 2 of the act, "shall secure compensation to his employees in one of the following ways:

"1. By insuring and keeping insured the payment of such compensation in the State fund," after which provision was made for securing compensation in other ways not pertinent to these proceedings. Section 52 of the act provided as follows: "Failure to secure the payment of compensation shall have the effect of enabling the injured employee or his dependents to maintain an action for damages in the courts, as prescribed by section 11 of this chapter."

Section 11 provided: "The liability prescribed in the last preceding section shall be exclusive, except that if an employer fail to secure the payment of compensation for his injured employees and their dependents as provided in section 50 of this chapter, an injured employee, or his legal representative in case death results from the injury, may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury; and in such an action it shall not be necessary to plead or prove freedom from contributory negligence * * * nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

It will be seen that the theory of the Compensation Law is one of compulsory insurance. A subsequent amendment to section 52 makes it a misdemeanor for an employer in the State, if his industry be hazardous, not to secure the payment of compensation to his injured employees in one of the ways set forth in section 50 of the act. The Appellate Division of the Supreme Court of the Third

Department has held that the State insurance fund is the primary source of insurance and that other methods of securing compensation are permitted substitutes for insuring in the State fund. The State is apparently justified in providing a fund to carry compensation at cost, because of the fact that employers are compelled to secure compensation insurance and the insurance being compulsory, the Legislature apparently felt that some agency should be brought into existence which should not only carry the insurance at cost, but which should be compelled to carry insurance for every employer of the State who asks for it, and is willing to pay the regular rate of premium for such insurance. Section 50 of the act provides three ways by which an employer may secure compensation for his injured workmen: *First*. By insuring in the State fund. *Second*. By insuring in a stock corporation or mutual association, and *Third*. By furnishing satisfactory proof to the Commission of his financial ability to pay compensation for himself and securing from the Commission authority so to do.

It is, therefore, quite evident that it was entirely optional with the petitioners to insure in the State fund, in a stock company, in a mutual association, to carry their own insurance, or to stand on their legal rights on the theory that the statute was unconstitutional as to them, if they felt that such a position was preferable, and refuse to insure at all. They chose of their own volition to apply to the State insurance fund for policies of insurance. While this was optional with the petitioners, the State insurance fund had no option whatever, provided the petitioners were ready and willing to pay the regular rate of premium, to refuse to issue the policies. Had these applications for insurance been properly made to the State fund with a proper tender of the regular premiums, the Commissioners, as the administrators of the State fund, could no doubt, on their refusal to issue the policies, have been compelled by mandamus to do so. Having issued the policies, the Commissioners were equally bound on the presentation of proper claims for compensation, accompanied by convincing proof, to make awards, and equally if they had refused to do so, could have been compelled by court action to perform that duty. Having made the

awards, I suppose there is no question but that they could equally have been compelled, as administrators of the State fund, to make payments under those awards. These premises are certainly sound, provided the law is constitutional.

For nearly three years it was the declared law of the State of New York that the Workmen's Compensation Law was constitutional as regards the employers of labor on navigable waters of the United States. The State Industrial Commission and the manager of the State fund during that period of three years, in issuing policies, requested by these petitioners and making and paying awards thereunder, therefore, but performed the duties incumbent upon them by their official positions and in accordance with the law as declared by the highest courts of the State. In so doing they have received many thousands of dollars of premiums, which they could not under the circumstances have refused. The State Industrial Commission has made awards of many thousands of dollars and the State fund has paid many thousands of dollars in awards and has set up adequate reserves in very large sums to carry losses so insured to maturity. Not only would it be impossible as a practical matter to recover these awards which have been paid as a matter of fact, because the funds have been dissipated by the recipients of them, but the statute expressly provides that awards once paid cannot be recovered. While it is true that the actual payments made under the policies issued to these petitioners have not been large, it is equally true that in other cases precisely similar payments have already been made aggregating much more than the total premiums received, this being necessarily so where the carrying of risks is made an insurance problem, the overplus received on one policy being used to make up the under-payment made under another.

It is quite manifest that, under these circumstances, to comply with the demand of these petitioners would very seriously impair the financial responsibility of the State fund, if it did not entirely destroy it. If these petitioners are entitled to the relief which they demand, then of course every other insurer in the State fund in like situation can recover all his premiums not actually expended

to pay losses, leaving the losses which have exceeded the premiums received as a dead burden upon other insurers in the State fund.

The precise question here presented seems to have been passed upon by the Appellate Division of the First Department in the case of *New Amsterdam Casualty Company v. Olcott*, 165 App. Div. 603. In that case the plaintiff had issued a compensation policy to the defendant as receiver, but had received only a portion of the premium. While a portion of the premium was still unpaid, the compensation law under which the policy had been issued was declared unconstitutional by the Court of Appeals in the case of *Ives v. South Buffalo Railroad Company*, 201 N. Y. 271. Suit was brought after the decision of the *Ives* case to collect the balance of premium, and the defendant pleaded, as the claimants do here, that the law having been declared unconstitutional, there was no liability to insure against and that the contract of insurance was without consideration. The court in ordering a judgment for the plaintiff said, among other things: "I think the defendant has misapprehended the meaning of the term 'risk' upon which the question at issue depends. If property insured against fire turns out to have been destroyed before or to have had no existence at the time the policy was written, clearly no risk ever attached, and the insurer could not claim to have given any consideration for the premium reserved. But here the risk insured against attached at the time the policy was issued and continued until the policy expired, because during all of that period the defendant rested under the possibility of being cast in damages in the event that accidents such as those insured against had happened. The fact that thereafter the act was held to be void did not destroy the risk — *qua* risk — which existed while the act was in force."

This reasoning seems to be unanswerable. In the present case not only has the State fund carried the risks for nearly three years and paid all outstanding claims, but it now stands ready, having canceled the policies *pro rata* as of May 21, 1917, the day when the law was declared unconstitutional as to the petitioners, to carry all losses arising prior to that date to their maturity.

This is manifestly the fair and honorable thing to do, because it gives the petitioners exactly what they purchased and treats every other insurer in the State fund, who is in like condition with these petitioners, in precisely the same way, and this it seems is in exact accord with the reasoning in the New Amsterdam Casualty Company case. Moreover, it is not clear that these companies did not have *some* employees whom they could be compelled, even since the United States Supreme Court ruling, to cover by compensation insurance. If this be so then on the petitioners' own theory there was a consideration for the premiums paid.

None of the cases cited by petitioners are in point. In none of them had the position of the parties so altered as to make it impossible to place them *in statu quo ante*. Even if petitioners had not received full consideration for their payment, as they unquestionably did, it is manifestly impossible to retrace all the steps taken by the State fund during the nearly three years when, by the declared law of the State, the coverage of petitioners was complete, and payments under many policies were necessarily made.

There is another reason for denying the application of the petitioners, and that is that the money which they now seek to recover was paid under a mistake of law. A mistake, it will be noted, made by both the petitioners and the manager of the State fund, following a like mistake made by the Appellate Division and the Court of Appeals. I suppose there is no rule of law better settled than the one which rests upon the doctrine that courts will not relieve litigants from mistakes of law, the theory being that every one knows the law, and on this theory it must be held that the petitioners here paid these moneys into the State fund knowing perfectly well that they were under no legal obligation to do so and that the payments therefore having been made voluntarily could afford no basis for a demand of a refund of the moneys paid. No protest accompanied the payment nor had the Commission instituted any proceeding to either compel the petitioners to insure or to collect the penalty for not insuring. I, therefore, advise that the application of the petitioners be denied. I do this all the more

[Vol. 14]

State Industrial Commission

readily because, as already stated, such denial works out absolute and unqualified equity and justice not only to these petitioners, but to all other insurers in the State fund.

On the 20th day of September, 1917, the Commission passed upon the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of HANNAH SULLIVAN, Widow, for Compensation under the Workmen's Compensation Law, for the Death of MICHAEL SULLIVAN, against INDUSTRIAL ENGINEERING COMPANY, Employer; CASUALTY COMPANY OF AMERICA, Insurance Carrier

Death File No. 671

(Decided September 20, 1917)

Where a death claim of a widow was commuted upon her remarriage into a lump sum the rate awarded to the minor children of her deceased husband should be increased.

An award was made in this proceeding to Hannah Sullivan on November 17, 1915, for death benefits for herself and four minor children, growing out of the death of her husband, Michael Sullivan. These awards were paid until the remarriage of the widow on July 22, 1917, when the widow's benefits were commuted into a lump sum. The question herein is as to whether by the elimination of the widow's claim the benefits to the four minor children should be increased and, if so, from what time. Subdivision 2 of section 16 of the Compensation Law provides in part, after providing for the compensation of the widow, that if there be any child or children of the deceased under eighteen years of age an additional 10 per cent of such wages shall be allowed for each such child until the age of eighteen, and that in case of the subsequent death of such surviving wife such surviving child of the deceased employee under eighteen years of age shall have his compensation increased to 15 per cent of such wages until he reaches the age of eighteen years. The provision of the law for the increase to 15 per cent for a child of the deceased employee is based upon the subsequent death of the widow. In this case the increase allowed is limited to 10 per cent upon the theory that minor children of a deceased who have the care and attention of a mother shall be limited to 10 per cent and that on being deprived of her care and attention as well as that of the father the compensation should be

increased to 15 per cent. *Held*, that while the wife survives, whether married or unmarried, the minor children are entitled to have their compensation increased to 10 per cent as soon as the payment to the widow reduces the weekly rate, which would be from the date of her remarriage. An award was made.

On November 17, 1915, an award was made in this proceeding to Hannah Sullivan for death benefits for herself and four minor children growing out of the death of her husband, Michael Sullivan. The widow was given a weekly allowance of 30 per cent of her husband's weekly wages, and each of the four children were given $9\frac{1}{2}$ per cent, making a total of $66\frac{1}{2}$ per cent. These awards were paid until the remarriage of the widow on July 22, 1917, after which, in pursuance of section 16 of the Compensation Law, the widow's benefits were commuted into a lump sum in the amount of \$449.90 and paid to her.

The question now arises whether by elimination of the claim of the widow the benefits to the four minor children shall be increased, and if so, from what time.

Claimant, in person.

J. L. Nolan, for employer.

John J. Ryan, for State Insurance Department, representing the Casualty Company of America.

LYON, Commissioner.—Claim is made that the allowance to the children should be increased as of July 22, 1917, the date of the remarriage of the widow, up to 10 per cent. It is quite manifest that if this were done, the insurance carrier would be compelled to pay for at least two years at the rate of more than $66\frac{1}{2}$ per cent of the employee's wages, since the widow has been compensated for two years from July 22, 1917, at the rate of 30 per cent, and if the allowance to the children is immediately increased to 10 per cent each, it would make a total of 70 per cent of the deceased's wages for the two years. To avoid this inconsistency it was suggested on the hearing that the increase to the children should be delayed for two years, that is, until July 22, 1919.

It was claimed on the other hand that no increase whatever should be made for the children until the death of the widow. I am not in accord with this view of the statute. The wording of subdivision 2 of section 16 is in part as follows, after providing for the compensation of the widow: "And if there be surviving child or children of the deceased under the age of eighteen years, the additional amount of ten per centum of such wages for each such child until the age of eighteen years; in case of the subsequent death of such surviving wife (or dependent husband) any surviving child of the deceased employee, at the time under eighteen years of age, shall have his compensation increased to fifteen per centum of such wages, and the same shall be payable until he shall reach the age of eighteen years; provided that the total amount payable shall in no case exceed sixty-six and two-thirds per centum of such wages."

In subdivision 4 of section 16 there is a provision that in case the total amount payable to the surviving wife and minor children does not aggregate 66 $\frac{2}{3}$ per cent of the average wages of the deceased, other relatives, if dependent, may receive benefits up to an aggregate, for all, of 66 $\frac{2}{3}$ per cent. It seems to me that the underlying theory of the Compensation Law is that the widow, children and dependents of a workman who is killed in the hazard of his occupation, shall be compensated at full rate at all times up to the total of 66 $\frac{2}{3}$ per cent, and that the insurance carrier by its contract of insurance agreed to that payment. This is emphasized, I think, by the provision already quoted, which makes it necessary on the *subsequent death* of such surviving widow, or dependent husband, that "any surviving child of the deceased employee, at the time under 18 years of age, shall have his compensation increased to fifteen per centum of such wages." It will be noticed that the increase to 10 per cent is not as in the case of the increase to 15 per cent made dependent upon the death of the widow. The theory of the statute, therefore, seems to be that minor children of the deceased who have the care and attention of a mother, shall be limited to 10 per cent and that on being deprived of the care and attention of the mother, as well as the father, the compensation

shall be increased to 15 per cent. There is a further provision that in case the children are too numerous to have the full amount of 10 per cent paid to them while the widow is living without going beyond the limit of $66\frac{2}{3}$ per cent of the wages, the mother shall continue to receive her full benefit, and the allowance to the children reduced *pro rata*; that is to say, it is the necessity of payment to the mother which at any time reduces the payment of the children below 10 per cent, and when the payments to the mother have ceased, either by death or commutation, the payments to the children should, it seems to me, be increased.

The question might arise why the compensation to the children, in case of remarriage, is limited to 10 per cent while in the case of the death of the widow it increases to 15 per cent. It seems to me that the theory underlying this difference is that a widow remarrying would still have care and supervision of her children by her first husband, although her added duties might diminish that care and attention somewhat, but that the whole of her care and attention being withdrawn by death the compensation increases to 15 per cent. In any event, I think, while the wife survives, whether married or unmarried, the minor children are, under the whole theory of the law, entitled to have their compensation increased to 10 per cent as soon as the payment to the widow reduces the weekly rate, so that by increasing the amounts to the children the limit of $66\frac{2}{3}$ per cent is not exceeded.

It is my opinion, therefore, that in the present case the rate to the minor children should be increased to 10 per cent, but not until the 22d day of July, 1919, and that it should continue at that rate for each child until he or she arrives at the age of eighteen years unless the widow before that time should die, in which event the rates should be increased to 15 per cent.

On the 20th day of September, 1917, the Commission acted upon the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of GEORGE W. LAMBERTSON, JR.,
Son, for Compensation under the Workmen's Compensation
Law, for the Death of GEORGE W. LAMBERTSON, against
ORANGE COUNTY TRACTION COMPANY, Employer; TRAVELERS'
INSURANCE COMPANY, Insurance Carrier

Case No. 6376

(Decided September 28, 1917)

Presumption raised by proof of accident followed by death shortly afterward.

On July 13, 1916, George W. Lambertson, father of claimant, while employed as a conductor on a trolley car of the Orange County Traction Company, in the performance of his duties went on top of his car for the purpose of fixing the trolley pole. It had been raining and he either received an electric shock or slipped and fell from the car striking his side against a switch rail. He was picked up unconscious but returned to work in a day or two. After working three or four days he was compelled to cease work and on August fourth went to a hospital where he died on August sixth of nephritis. The claimant is his only child and the question herein is as to whether his death was the result of the accident. *Held*, that it is not pertinent as to just which of the causes assigned as the reason for the accident resulted in his death; that the proof of the accident followed by death shortly afterward is sufficient to bring the case within the presumptions of section 21 of the act. An award was made.

George W. Lambertson, the father of the claimant, was a conductor on one of the trolley cars of the Orange County Traction Company, and on the 13th day of July, 1916, while in the performance of his duty went on top of one of the trolley cars for the purpose of fixing the trolley pole. It had been raining and he either received a shock of electricity or slipped and fell from the car, striking his side against one of the rails of the switch. He was rendered unconscious, but after a day or two returned to work and worked for three or four days, when he was compelled to cease work. He was received into St. Luke's Hospital at Newburgh on August fourth, and died there on August sixth of nephritis, as it is supposed. He had not lived with his lawful

wife for some years and her whereabouts are unknown. The claim of his mother for compensation has been denied, on the ground that proof of dependency has not been furnished. The claimant is his only child and the only question to be determined is, whether his death on August sixth has been traced with reasonable certainty to the accident which he sustained on July thirteenth.

Charles F. Dalton, for claimant.

Leo F. Quinn, for insurance carrier.

LYON, Commissioner.—I am of the opinion that following the decisions heretofore made by the Commission, as well as the court decisions, the claimant has made out a case for compensation. The evidence, such as it is, goes to show that the deceased was in ordinary health and that he rarely, if ever, had need for a physician. The fall which he had was a serious accident, as may be expected in case of a fall from the height from which the deceased was precipitated. The evidence is that he carried a very large discoloration on the side of his body up to the time of his death. Some of the physicians are of the opinion that there was no proof of chronic nephritis. Some of them, however, are of the opinion that an accident as severe as this could have produced an acute nephritis, such as is supposed to have caused his death. All agree that in case he had chronic nephritis not sufficiently severe to disable him, a fall such as he had would be sufficient to activate it and cause it to become acute. One physician is of the opinion that the real cause of his death was heat prostration caused by excessive hot weather during the time when he was debilitated, as the result of his fall. I think the evidence is sufficient to warrant a finding that his death was due either to heat prostration following the debilitation caused by his fall, or to nephritis either chronic actuated by his fall, or acute caused by his fall, and it is not very pertinent to the issues here to determine which was the real cause of his death.

I think also that the proof of an accident followed by death

[Vol. 14]

State Industrial Commission

shortly thereafter is sufficient to bring the presumptions raised by section 21 of the act into play. I advise that an award be made to the claimant.

On the 28th day of September, 1917, the Commission acted upon the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of EDWARD KAVANAUGH, for Compensation under the Workmen's Compensation Law, against HARRIS WOLF, Employer; ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, Insurance Carrier

Case No. 17081

(Decided September 28, 1917)

Injuries sustained by Edward Kavanaugh while alleged to be employed by Harris Wolf as a coal passer in the city of New York.

On September 7, 1916, while employed as a coal passer in the boiler room of a building on West Twenty-sixth street, the claimant blistered his hands, infection set in and he was incapacitated as to both hands as a result. The claimant alleges that his employer was Harris Wolf but the evidence shows that the Realty Company of West Twenty-sixth Street was his employer. No actual connection is shown between that company and Wolf nor was any notice of the accident ever given to the real employer. Claim dismissed.

The employee, Edward Kavanaugh, was employed as a coal passer in the boiler room of a building at 526 West Twenty-sixth street, in the city of New York. He claims to have been injured while working as such coal passer on September 7, 1916, blistering his hands. Through these blisters, his hands subsequently became infected and claimant has sustained severe disability in both hands on account of such infection.

The employee's claim for compensation is made against Harris Wolf. The proof, however, seems to be clear that he was employed by "The Realty Company of West Twenty-sixth Street." The evidence in the record does not disclose the connection of

Harris Wolf with The Realty Company of West Twenty-sixth Street. No question is raised by the insurance carrier, and upon an investigation it appears that the office of The Realty Company of West Twenty-sixth Street and the Estate of H. Wolf are in the same place, and that the Estate of H. Wolf is to all intents and purposes the owner of the corporation The Realty Company of West Twenty-sixth Street. The Realty Company of West Twenty-sixth Street wrote a letter to the Commission under date of October 23, 1916, advising the Commission that they had heard that Edward Kavanaugh claimed to have been injured in their employ but that they had no knowledge of any such injury and that inquiry made of their chief engineer shows that the condition of the man's hands was created outside of his employment.

There is no notice from the employee to the Commission and the letter above mentioned of the employer indicates that no notice was given to the employer. From the employee's claim for compensation it appears that the injury occurred September 7, 1916, and that the employee was compelled to quit work September 22, 1916.

Claimant in person.

P. J. O'Brien, for insurance carrier.

SAYER, Commissioner.—Three questions arise in this case for our determination: *First*, whether the claim was properly presented against Harris Wolf, or whether it should have been presented against The Realty Company of West Twenty-sixth Street; *second*, whether the claimant met with an accident arising out of and in the course of his employment, and *third*, whether the claimant's failure to give notice to his employer within ten days of the disability may be excused by the Commission.

As to the first point, I think we may assume that the claim was filed as against The Realty Company of West Twenty-sixth Street. The insurance carrier appeared at the hearings and raised no objection on that score. The letter notifying the Commis-

sion of the employee's claim was sent by The Realty Company of West Twenty-sixth Street and refers to the claimant as an employee of that company.

The question as to whether or not the blistering of the employee's hands and subsequent infection causing the disability presents a more difficult question. Without passing therefore upon that question, I will take up for consideration the third question, namely, whether the claimant's failure to give the statutory notice may be excused. This question was not raised at the hearing by the insurance carrier or the employer. None the less, under the statute and the rule laid down by the Court of Appeals in the case of *Bloomfield v. November*, 219 N. Y. 374, it is essential for the Commission to make a specific finding on this point.

Claimant filed with this Commission what purports to be a claim but which was unsigned and undated and which was received at the office of the Commission on October 10, 1916. Thereafter claimant filed a duly signed and verified claim which was sworn to on October 21, 1916, and filed in the office of the Commission on October 24, 1916. On October twenty-third the employer wrote a letter to the Commission which states: "We have been recently advised that one of our employees, Ed. Kavanagh, who acts as a coal passer, has been suffering from an infected hand. An inquiry made from our engineer shows, so far as is known, the condition of this man's hand was created outside of his employment with us, and that no record or complaint was made until after his hand had become inflamed. So far as we understand, his hand was injured outside of his work for our company and we are taking this opportunity of advising you in connection with this letter."

This statement, uncontradicted, indicates clearly the lack of knowledge on the part of the employer and inability to learn of an accident occurring at the time and in the manner described by the claimant. The nature of the accident is such as to entitle the employer to make the fullest investigation as promptly as possible. The employer subsequently filed a duly verified form of notice of injury in which he sets forth that he has no knowledge

of the time of the happening of any accident or of any knowledge with regard to how it happened.

Section 18 of the Compensation Law requires written notice to be given within ten days of the happening of the disability and authorizes the Commission to excuse the failure to give such notice only when the Commission finds from the evidence that notice could not have been given or that the employer and insurance carrier had not been prejudiced by such failure. This Commission has held repeatedly that verbal notice to the employer or proof of knowledge on the part of the employer of the accident would excuse the failure of giving written notice on the ground that the employer was not prejudiced. That is not the situation here. There is no evidence that the employer knew of the injury nor is there any claim made that verbal notice was given. Under the circumstances I do not think the Commission would be warranted in a finding in favor of the claimant.

I therefore recommend that the claim be dismissed because of the claimant's failure to give notice required by section 18 of the law.

On the 28th day of September, 1917, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of ANNA SCOTT, Widow, and Two Daughters, for Compensation under the Workmen's Compensation Law, for the Death of ROBERT B. SCOTT, against LEWIS R. GRANT, Employer; TRAVELERS' INSURANCE COMPANY, Insurance Carrier

Death File No. 17180

(Decided September 28, 1917)

Injuries sustained by Robert B. Scott, resulting in his death, while employed as a wagon driver by Lewis R. Grant.

On November 11, 1916, the decedent, Robert B. Scott, was in the employ of Lewis R. Grant as a driver in the business of heavy carting in which Grant was engaged. On the day in question decedent was carrying

[Vol. 14]

State Industrial Commission

bags of feed and loading them on a wagon, each bag weighing from 100 to 120 pounds. The work was very heavy, the bags being lifted from the ground to the mud guard of the wagon, some three feet, and then to the wagon. Upon completing his load he went to get his horse and was soon after found dead on the stable floor. The exact cause of his death is uncertain as the physicians were divided in opinion. An award was made in the first instance by the Deputy Commissioner but on application of the insurance carrier a rehearing was ordered, the original award set aside and the case now comes before the Commission for review and final action. *Held*, that speculations may not be indulged in as to the cause of death. Claim denied.

This claim was filed by Anna Scott, widow of Robert B. Scott, on behalf of herself and two daughters for death benefits growing out of the death of said Robert B. Scott while in the employ of Lewis R. Grant on November 11, 1916.

The deceased was employed as a driver of a wagon for Lewis R. Grant, whose business was that of heavy carting. On the day of his death he was engaged in carrying a number of bags of feed a distance of twenty feet and loading them on his wagon. These bags weighed 100 to 120 pounds. At the time of his death, deceased was fifty-nine years of age and weighed about 225 pounds. He was apparently in good health, had been employed continuously both as a driver and as a farm laborer and for the two weeks preceding his death had worked for Mr. Grant. He was accustomed to doing heavy manual labor.

The operation in which the deceased was engaged was one calling for the exercise of strength and imposing a considerable strain upon the man. Bags of feed were lifted from the ground on the mud guard of the wagon three feet from the ground and then to the wagon. The deceased apparently experienced some difficulty in lifting the last bag. Shortly after having completed loading his wagon, he went to the stable to get the horse and was then found lying on the floor dead.

An autopsy was performed at which were present the coroner and three other physicians. From the autopsy findings, it is very uncertain what was the cause of death. One physician testified that he found a slight hardening of the coronary arteries of the heart. Another one of the doctors testified that he found no

hardening of the arteries, but found a slight hardening or calcifying of the aortic valves of the heart. The conclusion of the doctors was that the deceased died as a result of a rupture of the right coronary artery. No such rupture, however, was found and the findings of the autopsy are entirely unsatisfactory as to the real cause of the death.

An award was made by the Deputy Commissioner, but on application of the insurance carrier, a rehearing was held, the original award set aside, and the case comes before the Commission for review and final action.

John T. Shaw, for claimant.

W. M. Wilbur, for insurance carrier.

SAYER, Commissioner.—The Commission is called upon in this case to determine whether the deceased, Robert B. Scott, died as the result of an accident arising out of and in the course of his employment. If the Commission could find on all the facts that the deceased sustained an unusual strain in the operation of lifting a bag of feed and that such strain caused a rupture of the coronary artery, then there would be no question but that an award of compensation to the widow and children should be made. I have searched the evidence carefully for facts upon which such a conclusion could be found, and I find nothing that is satisfactory to my mind.

Dr. Woods, the coroner, testified: "The coronary seemed to be sort of slightly hardened and there was some effusion around the heart, whereas we did not find any blood clot." He says the doctors talked it over among themselves and came to the conclusion that death was due to a rupture of one of these arteries which was slightly diseased. When asked to describe the rupture he testified: "I took it for granted, there was the diseased condition there, we didn't find any rupture." Upon these findings, the coroner gave a certificate of death to the effect that the deceased came to his death from a rupture of the right coronary artery.

Dr. Schumann, who has been in practice since 1887, testified

[Vol. 14]

State Industrial Commission

that he did not observe any hardening of the arteries but did observe a slight calcifying of the aortic valve. He found no rupture. He testified that no means were taken to ascertain positively whether there was a rupture. When asked whether he observed any condition that would cause death, he answered, "Well, I can't say I did observe any condition that might have actually caused the death, the condition of the heart may have contributed to it," and later testified, "No, I did not find anything actually that would account for the death," and said further that any ideas that the doctors might have about it would be more or less speculation. Later the doctor testified: "Q. But in this particular case, could anybody tell what caused his death? A. I should say not with any certainty, no."

Dr. Goodrich, who has been in practice since 1894, testified that he did not observe any condition of the heart that might have caused the man's death, and when asked whether he had heard any of the other doctors say that they had found a definite cause of death, testified that he could not say he did hear anything to that effect. Dr. Goodrich, who had known the deceased for some years and treated him for some little cough or cold, testified that "he was a large, heavy, well-developed man, one of those big, fat, flabby fellows, full blooded, red faced man. * * * Little too fat to be a real vigorous man, one of those heavy logey fellows." He testified that there was a fair accumulation of fat around the heart and that the abdominal wall was three-quarters of an inch of solid fat.

This case presents to my mind a picture of a heart disease of which people frequently die without warning or any premonitory symptoms. I do not believe the Commission is warranted in finding on such meagre facts that deceased came to his death as a result of any accident arising out of his employment. There is absolutely no evidence to support the conclusion as to the cause of death set forth in the coroner's certificate. It is probable that if a rupture of an artery of the heart had occurred by reason of strain in lifting, death would have been instantaneous and not after a lapse of ten minutes and after the deceased had walked away without giving any indication of the trouble. Moreover, in that

event, there would have undoubtedly been found a blood clot on or about the ruptured artery.

If we were permitted in this case to find that death was the result of an accident, we might find that almost any person dying of heart disease while in the course of his employment died as the result of an accident arising out of it. I do not think we may indulge in speculations as to cause of death. There must be some definite evidence upon which to make a finding and to my mind that is entirely lacking in this case.

Accordingly I recommend that the claim be denied.

On the 8th day of September, 1917, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of HARRY CARLSON, for Compensation under the Workmen's Compensation Law, against J. EDWARD OGDENS Co., INC., Employer; STATE INSURANCE FUND, Insurance Carrier

Case No. 45938

(Decided September 28, 1917)

Injuries sustained by Harry Carlson while employed by J. Edward Ogdens Co., Inc., the said company being organized under the laws of New Jersey but having a place of business in the city of New York.

The only question herein is as to whether under the circumstances of this case the claimant can be compensated for his injuries under the New York Compensation Law. He is himself a resident of Rhode Island. The employer is a New Jersey corporation doing business in the city of New York. Claimant was employed to work for the said company in the State of New York but after taking the position he was sent to New Jersey and for a while worked in Panama. When last working for the employer in New York city he was directed to go to Houston, Tex. He went there and in the course of his employment at that place received the injuries upon which this claim is based. The claimant insists that this case is governed by the decision of the Court of Appeals in *Post v. Burger*, 216 N. Y. 544. The distinction between that case, however, and the one now under consideration is specifically pointed out. *Held*, that an award should be denied in this instance. Award denied on the ground that our statute does not cover the case.

[Vol. 14]

State Industrial Commission

The claimant is a resident of Rhode Island. The employer is a corporation organized under the laws of New Jersey but having a place of business in the city of New York. The claimant was engaged to work for the employer in the State of New York and worked here for a time; for a portion of the time he worked in New Jersey; for a considerable portion of time he worked at Panama. When last working for the employer in New York city he was directed to go to Houston, Tex. He complied with the request and was injured in the course of his employment at that place.

The question to be determined is, whether his injury is compensatable under the New York Compensation Law.

Crim & Wemple, for claimant.

James A. Richardson, for State Fund.

LYON, Commissioner.—It is insisted by the representative of the claimant that this matter is to be governed by the decision of the Court of Appeals in the case of *Post v. Burger*, 216 N. Y. 544. In the *Post* case, a resident of New York was hired in New York to perform services in New Jersey where he was injured. The Court of Appeals held that under those circumstances compensation was payable under the New York law, on the general theory that the contract of employment carried with it the New York statute. The question here, however, is whether a resident of *another* State, who happens to be employed in the State of New York to work in a third State, is to have his case governed by the decision in the *Post* case. It is true that the opinion in the *Post* case, if taken broadly, might be held to govern every case of an injured workman whose contract of hire was made in New York State without regard either to his place of residence or to the place where the injury occurred, but it is quite evident that no such broad interpretation of our statute was necessary to the decision of the *Post* case. That case was one relating to a resident of New York hired in New York and the fact that the opinion was not in every particular limited to those precise features, does not

necessarily warrant us in applying the broadest terms used in the Post case to the situation which is found here. I think, therefore, we are bound to look further than the exact wording of the Post decision in order to determine the legal question involved.

The Court of Appeals in the Post case gave as one reason for holding that the New York statute had extra-territorial force, the fact that the underlying purpose of our Compensation Law is to provide that injured workmen and their dependents shall not become objects of public charity; in other words, became a charge upon the community. One of the general theories also underlying the whole scheme of workmen's compensation is that it is an exercise of the police power of the State based upon the same necessity of preventing injured workmen and their dependents becoming public charges. It was said in the Post case that an injured workman who resides in New York, but who is hurt outside of the State, is just as apt to become a public charge as though he were hurt in the State of New York, and seizing upon the fact in that case that the injured workman resided in New York State and was working when injured under a contract made in New York State, the court held that the contract in that particular case carried with it the New York Compensation Law, in order to effectuate the manifest purpose of the law itself.

It will be noticed that if the claimant here or his family should, by reason of his accident, become a public charge, it would not be upon the people of the State of New York, but of Rhode Island where he resides. That reason for the extension of the jurisdiction of the New York Compensation Law extra-territorially, therefore, disappears in this case. With the disappearance of this reason it is difficult to see what basis can be found for extending our jurisdiction to cover an accident happening in Texas. I am not able to see what possible right the Legislature of New York can have to regulate the relations between a resident of Rhode Island and a corporation of New Jersey which would govern an injury to the employee happening in Texas. The reasons for the court's decision in the Post case clearly do not govern. The New York statute is based on a scheme of compulsory insurance. Clearly,

New York State cannot compel employers either in New Jersey or in Rhode Island, or in Texas, to cover their employees everywhere with compensation insurance. One of the fundamental principles of our Compensation Law is that insurance made compulsory upon the employer is balanced by a release of the employer from common-law liability. It is well settled that in actions of tort the law of the place where the tort is committed must govern. The consequence is that if the claimant's injury arose from the negligence of his employer, he has undoubtedly, at common law or perhaps by statute, a right of action under the laws of Texas, and this right of action cannot be taken away by the New York Workmen's Compensation Law.

It is quite evident, therefore, that the feature of our law which is compensatory to the employer for compulsory insurance is not present in this case. I think it altogether probable that the claimant, if he were injured in Texas by the negligence of his employer, could, notwithstanding the New York Compensation Law, maintain an action even in the State of New York for damages under the Texas law, the States affording these remedies to the citizens of each other under the general doctrine of comity. I do not think that a resident of Rhode Island suing a New Jersey corporation for a negligent injury in Texas would be barred by our statute from recovery in our courts of law.

The question may arise whether the claimant in the *Post* case, if he had elected to sue at common law in New Jersey where his accident happened, would have been barred by the provisions of the New York Compensation Law. I am inclined to think he would. A resident of New York seeking the aid of a New Jersey court, carrying with him, as our Court of Appeals holds he does, the law of his home State, might very well be held to be debarred from pursuing a remedy which the statute of his own State had taken away from him.

In the case of *Deeny v. Wright & Cobb Lighterage*, 36 N. J. Law, 121, the petitioner, a resident of Newark, N. J., was employed in New Jersey by a New Jersey corporation and was injured in New York. The New Jersey court in sustaining his claim for compensation under the New Jersey law said: "The

objects of our act are to protect the citizens and inhabitants of New Jersey."

In denying an award in the present instance, the Commission will be following its own ruling in the case of Lloyd v. Powers Specialty Company, Bulletin, Vol. 1, 6, p. 9; 7 St. Rept. Rep. 409. It has been thought, however, best to re-examine the question in order to point out the distinction which I think must be made between the present case and the Post case. I advise that an award be denied, on the ground that our statute does not cover the case.

On the 28th day of September, 1917, the Commission acted upon the foregoing matter in accordance with the foregoing opinion, the chairman concurring in the result.

In the Matter of the Claim of MARIE E. McCracken, Mother, for Compensation under the Workmen's Compensation Law, for the Death of WILLIAM McCracken, against EASTERN GRAVEL CORPORATION, Employer; LONDON GUARANTEE AND ACCIDENT COMPANY, LTD., Insurance Carrier

Case No. 53752

(Decided October 11, 1917)

Injuries sustained by William McCracken, resulting in his death, while employed on a dredge operated by the Eastern Gravel Corporation near Port Jefferson, L. I.

On February 2, 1915, William McCracken, the decedent, was employed near Port Jefferson, L. I., by the Eastern Gravel Corporation, which was engaged in operating a dredge in Long Island Sound for the purpose of taking gravel from the bottom of the sound and placing it upon scows for transportation by water for commercial purposes. During a storm the dredge became unmanageable and capsized and decedent was drowned. The claim was filed with the Commission in 1915 but was not progressed. The insurance carrier, however, had been paying compensation and so continued until after the Jensen and Walker cases had been decided by the United States Supreme Court. The matter now comes on at the

[Vol. 14]

State Industrial Commission

instance of the insurance carrier to have the Commission rule that the company was right in ceasing to make such payments. *Held*, that an award should be made herein by bringing the compensation up to date and continuing the case. An award was made as above provided.

Claim is made by the mother of William McCracken for death benefits growing out of his death on February 2, 1915. No question is raised but that the claimant is a dependent within the meaning of the Compensation Law. The employer was engaged in operating a dredge in the sound near Port Jefferson, L. I., for the purpose of taking gravel from the bottom of the sound and placing it upon scows to be transported by water for commercial purposes. Notice of injury says that, "During stress of weather dredge became unmanagable and capsized." Mr. McCracken was drowned. Claim for compensation was filed with the Commission on February 8, 1915. The papers show that the matter came on for a hearing on two or three occasions, but nothing seems to have been done. The insurance carrier, however, began paying compensation and apparently continued to pay the same until after the decision in the Jensen and Walker cases by the United States Supreme Court on May 21, 1917. The matter now comes on, on the application of the insurance carrier, for the purpose of having the Commission rule that compensation has rightfully ceased pursuant to the decision in *Matter of Jensen*.

Nelson Keach, for claimant.

B. A. H. Smith, for insurance carrier.

LYON, Commissioner.—It is strenuously insisted on behalf of the claimant that the operation of this dredge under the circumstances was not covered by admiralty rules. The dredge was not being used in navigation, nor for the purpose of deepening the harbor for navigation purposes. The record shows that the sole purpose of the use of the dredge was to secure gravel for commercial purposes, the gravel apparently when taken out by the dredge being placed upon scows to be transported. I am not altogether certain that under the doctrine laid down in *Hydraulic Steam*

Dredge No. 1, 80 Fed. Repr. 545, it might not be held that the operation of this dredge for the purpose of securing gravel to be used in commerce is outside the jurisdiction of admiralty. Counsel to the Commission, however, has been over that feature of the case with a good deal of care and is of the opinion that the case falls within the admiralty jurisdiction.

There arises, however, another question, turning on the contract of insurance, which the Commission has not up to this time given very serious consideration. Although the general doctrine herein expressed underlay the decision in the Moran, Champion and Shanley cases, recently decided by the Commission, it was not stressed and the Commission's jurisdiction was there sustained on the general theory, in the two former cases, of estoppel, and in the latter case, of agreement to pay compensation. Neither of these two theories is strictly applicable to the present case, because there has been no award made by the Commission so as to bring the doctrine of estoppel into play with the same force as in the Moran and Champion cases; nor is there any agreement made under the Compensation Law as in the Shanley case. I am disposed to think, however, that an award in this case should be made under the contract of insurance, following the intent of the statute, even though the case is an admiralty one. It will be noticed that there was no insurance question involved in the Jensen, the Walker or the Winfield cases, decided by the United States Supreme Court, the employer in each of those cases being a self-insurer. Our courts have held that the State fund is the primary source of compensation insurance and that other insurance is merely a permitted substitute. Section 90 of the Compensation Law brings the State fund into existence and is in part as follows: "There is hereby created a fund to be known as 'the state insurance fund' for the purpose of insuring employers against liability under this chapter and of assuring to the persons entitled thereto the compensation provided by this chapter."

It thus appears that the State fund was brought into existence both to indemnify the employer and to secure compensation to the employee. We may, I think, assume that all other permitted insur-

ance carries with it the same underlying idea, since the permitted substitute can hardly be more favorable to the insurance carrier than the original which it displaces.

Turning now to the policy of insurance issued by the insurance carrier in this case, we find that, in pursuance of subdivision 1 of section 54 of the Compensation Law, the policy contains the following provision:

"EMPLOYEE'S RECOURSE TO COMPANY

"CONDITION B. The Industrial Commission of the State of New York shall have the right to enforce in the name of the people of the state, for the benefit of the persons entitled to the compensation herein insured, either by filing a separate application or by making the Company a party to the original application, the liability of the Company in whole or in part for the payment of compensation; provided, however, that payment in whole or in part of such compensation either by the Employer or the Company shall, to the extent thereof, be a bar to the recovery against the other of the amount so paid."

This provision apparently carries out the underlying purpose of the Compensation Law to assure payment of compensation by the insurance carrier to the injured employee, as well as to insure the employer against loss for industrial accidents. The policy of insurance in the present case was written, and the accident which lies at the base of this application occurred, more than two years before the decision of the United States Supreme Court in the Jensen case, during all of which time the New York Workmen's Compensation Law was held by the highest courts in the State of New York to cover employees engaged on vessels in the navigable waters of the United States.

In the case of the *New Amsterdam Casualty Company v. Olcott*, 165 App. Div. 603, suit was brought by a casualty company to recover the balance of premium upon a policy of compensation insurance issued under the prior statute in New York which was declared unconstitutional in the case of *Ives v. South Buffalo Railroad Company*, 201 N. Y. 271. A portion of the premium had been paid and suit for the balance was brought after the decision

of the Ives case. The Appellate Division ordered judgment for the plaintiff, on the ground that, notwithstanding the unconstitutionality of the law, there had been coverage during the time when the Compensation Law had been declared by the courts to be the law of the State. The court there said: "I think the defendant has misapprehended the meaning of the term 'risk' upon which the question at issue depends. If property insured against fire turns out to have been destroyed before or to have had no existence at the time the policy was written, clearly no risk ever attached, and the insurer could not claim to have given any consideration for the premium reserved. But here the *risk* insured against attached at the time the policy was issued and continued until the policy expired, because during all of that period the defendant rested under the possibility of being cast in damages in the event that accidents such as those insured against had happened. The fact that thereafter the act was held to be void did not destroy the risk — *qua* risk — which existed while the act was in force."

I think this may be held to be the law in this case for our purposes. It may be said that this quotation from the New Amsterdam case is *obiter dictum* because the court went on to say: "It would seem, however, as if all doubt was removed by the agreement of the parties themselves, for the rider provided 'The actual wages and earned premium shall be determined in the manner set forth in the Policy to which this indorsement is attached, and it is agreed that such earned premium shall be retained by the Company, regardless of the construction which may be given by the courts to the law referred to herein,' being the act in question." But there is in the standard form policy here used something which is very like the agreement to which the learned judge there refers. It is as follows:

"UNCONSTITUTIONALITY OR INVALIDITY OF LAW REQUIRES READJUSTMENT OF PREMIUM RATES.

"CONDITION F. If the New York Workmen's Compensation Law shall be declared invalid or unconstitutional, in whole or in

part, by the judgment of the court of last resort, the premium rates provided by this policy or any endorsement hereon, shall apply until the date of such judgment, and the Company shall immediately readjust the premium rates provided by this policy subject to the approval of the Superintendent of Insurance so as to equitably reflect the changed conditions."

This, it seems to me, is tantamount to an agreement between parties that premiums shall be paid on the one hand and compensation losses paid on the other, up to the time when the Workmen's Compensation Law shall have been held unconstitutional in whole or in part, notwithstanding the invalidity of the law, just as in the case referred to in 165 Appellate Division. I think the parties to this contract of insurance definitely agree that it should be treated as valid for all purposes and covering all employees of the assured up to the time, if ever, when it should be declared invalid in whole or in part, and that, from and after that date, such adjustment should be made as would exclude employees not covered by the act as construed by the courts. There can be little doubt that the insurance carrier here agreed to hold the insured harmless from all claims up to the time when the law was finally adjudicated. On the theory already referred to and under the provisions of subdivision 1 of section 54 of the Compensation Law embodied in the policy, I think the Commission may, and should, give the injured workman a protection under the policy similar to that given the employer. The matter thus turns upon the construction of the insurance contract rather than constitutional law. If the policy is held to cover both employer and employee up to the time when the Supreme Court of the United States held that maritime operations were not covered by the New York law, and is then canceled *pro rata* as of that date, it certainly gives to each party exactly what was contemplated when the contract was made, namely,—to the insurance company its full premium of insurance for the period covered, and to the insured his complete coverage under the act. It is to be noted also that the claimant when she made her claim for compensation, which has been accepted and acted upon by the insurance

carrier, executed the following assignment of every cause of action which she had for the death of her son: "I hereby agree to accept the compensation awarded by the State Workmen's Compensation Commission in lieu of any other right or cause of action which I may have against any person, firm, or corporation, in consequence of such accident; and, in consideration, if any, when awarded, I hereby assign and set over unto the State Workmen's Compensation Commission, for the benefit of the State Insurance Fund, if compensation be payable therefrom and otherwise to the person or association or corporation liable for the payment of such compensation, all my right, title, and interest, if any, in such cause of action for such injury, loss or damage against any person, firm or corporation."

Not only therefore have both parties to the insurance contract placed themselves in a position where they have agreed to treat it as giving complete coverage to all employees up to May 21, 1917, but the claimant has transferred, in consideration of receiving compensation, her entire cause of action to the insurance carrier for the purpose of allowing it to recoup itself from any third party who may be liable, and this being accepted by the insurance carrier, is an added reason for holding that the intent of the parties, as well as the purpose of the statute, as outlined above, should be carried out, and I advise that an award be made bringing the compensation up-to-date and continuing the case.

Such a decision may necessitate a reconsideration of some cases decided immediately after the Supreme Court decision and before the situation had been carefully analyzed, but that should not deter us from now correcting the error if one has been made.

On the 11th day of October, 1917, the Commission acted upon the foregoing matter in accordance with the foregoing opinion.

[Vol. 14]

State Industrial Commission

In the Matter of the Claim of MARIA GRUBESICH and Minor Child, for Compensation under the Workmen's Compensation Law, for the Death of MAX GRUBESICH, against VALLEY MILLS COMPANY, Employer; FIDELITY AND CASUALTY COMPANY, Insurance Carrier

Death Case No. 8936

(Decided October 18, 1917)

Injuries sustained by Max Grubesich, resulting in his death, while employed by the Valley Mills Company.

On February 19, 1917, Max Grubesich, the deceased, while engaged in a hazardous occupation in the employ of the Valley Mills Company, sustained injuries resulting in his death. The deceased was a citizen of Austria-Hungary and had been in this country for several years but left whatever family he had in his native land. In this case the only question involved is as to whether there is proper proof of dependency. The claimant is represented by attorneys who appear in behalf of the Consul General of Sweden, that nation having taken over from Austria-Hungary the care of the interests of its nationals on the severance of diplomatic relations between the United States and Austria-Hungary. The claim is made that the Commission should make an award to the wife and child of the deceased, through the aid of the Swedish Consulate. To do this, however, it would first be necessary to find that there is sufficient evidence to sustain an award. *Held*, that the testimony and evidence presented are by no means sufficient to prove that the claimant was the wife of the deceased, and that, while it is probable that the claimant was the wife of the deceased and the child called Marko was the son, under all the circumstances the matter should be held in abeyance until such time as the war conditions make it possible to get proof of the marriage, birth of issue and of continued survivorship of wife and child. Ordered that the case be held in abeyance.

Claim is made on behalf of Maria Grubesich and her minor child for death benefits growing out of the death of Max Grubesich on the 19th day of February, 1917. There is no question but that the deceased was engaged in a hazardous occupation at the time of his injury. The only question in the case is whether there is proper proof of dependency.

Kramer & Leavitt, for claimant.

F. McKeever, for insurance company.

LYON, Commissioner.— The deceased was a citizen of Austria-Hungary and had been in this country for several years, but left whatever family he had in his native land. The claim for compensation is signed on behalf of the claimant by Stipe Grubesich, who is the uncle of the deceased. The claimant is represented by attorneys who appear on behalf of the Consul General of Sweden, that nation having taken over from Austria-Hungary the care of the interests of its nationals upon the severing of diplomatic relations between the United States and Austria-Hungary. It is the claim of the attorneys representing the Swedish Consulate that the Commission may and ought to make an award to the wife and child of the deceased which cannot be gotten directly to Austria-Hungary, owing to the severance of diplomatic relations, but which, through the aid of the Swedish Consulate, can be deposited here and in some way drawn against or made use of in Austria-Hungary, by diplomatic correspondence.

This is probably so if we can find there is sufficient evidence to sustain an award. There is in the folder no direct evidence that the deceased was ever married or left any children him surviving. There is an affidavit from William Watts, who states that he has been appointed administrator of the property of the deceased and "that said deceased left him surviving a widow and minor child in Austria, as his only heirs and next of kin," but this is manifestly only a statement from hearsay and states no sources of the deponent's information. On May eleventh, the Commission directed that an official letter be sent from the Commission to the alleged widow in Austria-Hungary, advising her to submit proof of marriage and birth of her child, and such a letter was sent under date of May fifteenth, but was returned to the Commission by the Post Office Department with the indorsement, "Mail service suspended to country addressed." There are in the folder extracts from two letters supposed to have been

[Vol. 14]

State Industrial Commission

written by the alleged wife, which appear by the post mark on the envelope to have been written in the year 1913 or 1914. Both of the letters speak of little "Marko" and one of them closes with the statement "Until death your wife, Maria Grubescic."

While it is altogether probable that this woman was the wife of the decedent and the child called Marko was his son, it seems to me that there is not sufficient proof on this score, and even if there were, it does not seem to me that under the circumstances, the presumptions of continued existence, which the attorneys for the Swedish Consulate insist upon, can be indulged in in a case where the three years intervening between the letters and the present date are occupied in a desperate war such as has been going on if not in Austria-Hungary, itself, at least between that country and the allies in Europe, especially when there is another way of handling the matter which will do absolute justice, although it may be delayed. It must be remembered that even if it were possible, under ordinary circumstances, to regain the money when paid, the statute provides that no payment of an award can be recovered, even if it were otherwise possible.

It seems to me that the only proper way to handle this case is to hold the whole matter in abeyance until such time as the war conditions make it possible to get proof of the marriage, birth of issue and of continued survivorship of the wife and child, and I so advise.

On October 18, 1917, the Commission passed upon the foregoing matter in accordance with the foregoing opinion.

In the Matter of Claim of AUGUST BLATTNER, for Compensation under the Workmen's Compensation Law, against PA PRO COMPANY, Employer; UTICA MUTUAL COMPENSATION INSURANCE COMPANY, Insurance Carrier

Case No. 15283

(Decided October 18, 1917)

Injuries sustained by August Blattner while employed by the Pa Pro Company as a planer in the Fulton Machine and Vise Company's plant, resulting in the amputation of a portion of claimant's left hand.

On December 9, 1915, while in the employ of the Pa Pro Company, claimant met with an accident whereby the greater portion of his left hand was amputated. A hearing having been had an award was made, the insurance carrier putting upon the record, however, a statement that it consented to an award with the understanding that if at any time subsequent a ruling is handed down by the courts which shows what the loss of four fingers without the loss of the thumb should be, and should this court's decision be adverse to the ruling of the Commission the right to reopen the case and recover whatever compensation has been paid is reserved. The insurance carrier thereafter continued to pay compensation but after several decisions by the Court of Appeals moved to have the case reopened and the award modified. Such rehearing having been had the Commission held that claimant had permanently lost the use of his left hand and that the award should be affirmed on the merits. Award affirmed.

The claimant while in the employ of the Pa Pro Company on December 9, 1915, met with an accident by which the greater portion of his left hand was amputated. The case came on for a hearing shortly after his accident and without the taking of testimony an award was made for the loss of use of the hand, in accordance with the rulings of the Commission in other cases. The insurance carrier made no objection to the award but did have put upon the record the following reservation: "I consent to an award with the understanding that if at any time subsequent to date a ruling is handed down by the courts which shows what the loss of four fingers without the loss of the thumb should be, and

should this court's decision be adverse to the ruling of the Commission we desire the right to reopen the case and recover whatever compensation is paid."

Payments of compensation were thereafter commenced and have continued down to date, but the insurance carrier after the decision in the cases of Grammici and Kanzar by the Court of Appeals in 219 New York, and the subsequent decision of the Appellate Division in the case of Adams v. Boorum & Pease Company, moved to have the case reopened and the award modified. An X-ray of the hand was presented and physicians appeared to give their opinion as to the use which could be made by the claimant of his hand. The deputy who heard the matter, on the application for reopening, denied the application partly, at least, on the ground that the insurance carrier had lost its right by not having appealed from the decision. The matter thereupon was placed upon the Commission's calendar for a rehearing and the injured man was present, so that the Commission had the opportunity of investigating the condition of his hand. The accident happened prior to the recent amendment of the law, which gives the Commission the right, where there is the loss of more than one finger, to determine the proportionate loss of the use of the hand.

George S. Reed, for claimant.

Hart, Stevenson, Walton & Senior, for insurance carrier.

LYON, Commissioner.—The attorney for the claimant insists that the stipulation inserted in the record when the award for loss of the hand was made ought not to be given any effect, because it was made in the absence of the claimant. This is probably true if it be taken strictly as a stipulation, but it does show on its face that the insurance carrier did not acquiesce in the Commission's finding; but was willing that the matter should stand in abeyance until after the courts had made some decisions which would further guide the Commission in such cases. I do not think the Commission should now take the position that it will not give a further

hearing in the matter. The position which the carrier took when the case was first decided certainly makes for expedition in handling cases, and does not put upon the Commission the burden of handling useless appeals where questions which arise can be disposed of by rulings in other pending cases, but even if there had been no such saving clause inserted in the record, I should be disposed to grant the insurance carrier's application to reopen the case under section 74 of the law. While these very close legal questions are in an unsettled condition, I am of the opinion that we ought to be very lenient in reconsidering cases if need be, in order that the real intent of the law may be carried out. This, perhaps, will not be so necessary after the puzzling legal questions have been definitely decided by the higher courts.

Turning now to the merits of the case, the following quotation from the insurance carrier's brief is perhaps as succinct a statement of the condition of the claimant's hand as is necessary, with one slight modification to be noted hereafter: "While using a planer or jointer machine in the Fulton Machine and Vise Company's plant, in making the pattern, the blades or knives of the machine struck a hard knot, which caused the piece of wood to twist around quickly, and threw claimant's left hand into an opening, and in contact with the revolving knives, injuring his left hand in such a manner as to necessitate the amputation of the four fingers of the left hand, and portions of the metacarpal bone of that hand. The index finger was amputated substantially at the base of the finger; the metacarpal bone of the middle finger about one-half its length; the metacarpal bone of the ring finger two-thirds its length; and the metacarpal bone of the little finger close to its base. In other words, the palm of the hand was amputated diagonally, from the base of the index finger to close to the base of the metacarpal bone of the little finger."

The amendment which I should make to this statement is based upon the physical examination of the hand when the claimant was present, the diagram drawn by the physician who first attended him and by the X-ray picture. I think it is not quite correct to say that the index finger was amputated substantially at the base

of the finger. The amputation of that metacarpal bone is considerably above the base of the finger and toward the wrist.

Under the law as it stood at the time of this accident it is not possible for the Commission to take any middle course between the loss of the use of the entire hand and 116 weeks for the loss of the four fingers. We are compelled to one of three courses, either to pay him for the loss of four fingers and close the case, or to find that he has lost the use of his hand and give him 244 weeks, or to pay him specifically for the loss of the four fingers, 116 weeks, and then put him on a basis of reduced earnings from and after the end of 116 weeks, to run perhaps all his life. It is true that on the testimony, as it now stands, the claimant is not at the present time in a position where he is losing wages. He has returned to his work at the same wages which he had before he was hurt. The question, therefore, of continuing disability on the basis of reduced earnings does not at present arise, but we have to take into account the possibility that it may arise at any time in the future. If for any reason his present employer should go out of business or find it impossible to use the claimant in his present position, he might be thrown out of employment where his earning capacity would be immediately and very seriously reduced. If this should happen and no definite award for the loss of use of his hand can be made, the case is one of many which would run on for many years and make an almost endless source of trouble to determine, because of the necessity of repeated reconsiderations as the years go on. It is probably for this reason that the Legislature provided for specific award for amputation of members.

There seems to have been a theory that where an amputation takes place, there is a conclusive presumption that there will be a certain loss of earnings. The statute, when the claimant was injured, also made provision that "permanent loss of the use of a hand, arm, foot, leg or eye shall be considered as equivalent to the loss of such hand, arm, foot, leg or eye." The question to be determined, therefore, is, whether we shall now find that the claimant here has lost the permanent use of his hand, or whether

we shall limit him for present purposes to 116 weeks for the amputation of his fingers and leave the case open for further consideration. An examination of the claimant's hand, when he was before the Commission, as well as of the X-ray picture and the diagram made by the attending physician, makes it very plain to my mind that the claimant has for practical purposes nothing of his hand left except the thumb. It seems to me that more than three-fourths of the palm of the hand is gone. The stub of metacarpal bone for the index finger can be separated a trifle from the thumb so that it is possible to put a lead pencil between the thumb and this bone, but it is manifestly of no use for vocational purposes. I doubt whether any court reviewing our decision in this case, if it were possible to have ocular demonstration of the condition of the claimant's hand, would find that the claimant had not lost the use of his hand. The thumb which alone is uninjured is practically useless unless it can be used in conjunction with a finger opposite. When it cannot be placed opposite a finger, it is rather a hindrance than otherwise to a man in industry. A hand in the shape in which the claimant's hand is now seems to me about as useless for vocational purposes as a half pair of shears would be for cutting. In the latter case there is, to be sure, a considerable portion of the shears left, but they won't cut. In the case of this injured man there is a considerable portion of the hand left, but it cannot be used. If the choice were given me of having a hand such as the claimant has, or having my hand amputated at the wrist, I would not hesitate a moment to choose the latter. In my opinion, an artificial hand properly applied at the wrist, would be more valuable in industry than this mangled member, and for some purposes, such as trucking and handling freight, a hook such as is seen in frequent use in case of an amputated arm, would certainly be far preferable to this fraction of a hand. This is the impression which an actual examination of this hand has made upon me, in the absence of any guidance from the courts.

I do not think the Adams, Grammici and Kanzar cases are necessarily to be our guides in this case, for in none of them was

there any injury to the palm of the hand. They were simply cases of the amputation of fingers. After the decision of the Grammici and Kanzar cases in the Court of Appeals, the Appellate Division of the Third Department in the case of Cobb v. Library Bureau, reported in 176 App. Div. 91, made a decision which, it seems to me, is ample support for the position taken here. In that case the court said: "The Commission finds he lost all the fingers of his left hand except the thumb, and including the entire metacarpal bones of the middle, ring and little finger, and the major portion of the metacarpal bone of the index finger, thereby removing the entire palm from the hand, by reason of which injury William H. Cobb has permanently lost the use of the left hand. * * *

"The law provides that the permanent loss of the use of the hand is equivalent to the loss of the hand. We find nothing in Grammici v. Zinn (219 N. Y. 322) or in Matter of Kanzar v. Acorn Manufacturing Co. (219 N. Y. 326), recently decided by the Court of Appeals, contrary to the award.

"In the Grammici case the employer and insurance carrier produced evidence tending to prove that neither the hand nor the use of it was lost. The Court of Appeals concluded there was no contradiction to this testimony and that therefore the finding that the claimant had lost the use of his hand was unsupported by evidence and was error of law.

"In the Kanzar case no evidence was produced before the Commission; the case rested upon reports and the court determined that there was nothing in the reports tending to show that the claimant had lost the use of the hand."

It is true that here some physicians were called who testified that the claimant had some use of his hand but I do not think that expert testimony from physicians in a case of this kind adds anything to the knowledge which the Commission itself has from a personal examination of the claimant's hand, coupled with the X-ray pictures. Personally, if any number of physicians were to testify that this man has a left hand which is now useful in any vocation, I would not give any credence at all to such testimony. I am very firmly of the opinion, based upon personal examina-

tion of the hand, that the claimant has permanently lost the use of his left hand and I think that the award should be affirmed on the merits.

On October 18, 1917, the Commission passed on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of HANNAH M. BARNES, Widow, for Compensation under the Workmen's Compensation Law, for the Death of HENRY W. BARNES, against ALEXANDER UTRECHT, Employer; FIDELITY AND CASUALTY COMPANY OF NEW YORK, Insurance Carrier.

Case No. 18319

(Decided October 18, 1917)

Injuries sustained by Henry W. Barnes, resulting in his death, while employed by Alexander Utrecht.

On July 20, 1915, the decedent, Henry W. Barnes, while in the employ of Alexander Utrecht, was going down a flight of steps where he was employed when he stepped on a loose board which tilted and from which he jumped, in order to save himself, fracturing the patella of his right knee. On September 6, 1915, he was taken seriously ill and died on that day as the result of cerebral hemorrhage. The matter was heard before the Commission and an award was made for disability and the compensation was duly made. The Commission made an award for death benefits with three Commissioners sitting. The matter is now brought before the full Commission upon the application of the insurance carrier for a rehearing. Upon the rehearing from the facts adduced the award formerly made was rescinded and the claim for death benefits dismissed.

Claim is made by Hannah M. Barnes, as widow of Henry W. Barnes, for death benefits to herself and minor son, growing out of the death on September 6, 1915, of her husband, Henry W. Barnes, as the result as it is claimed of an accident on the 20th day of July, 1915. The undisputed evidence is, that the deceased on July 20, 1915, while coming down a flight of stairs stepped on a loose board which tilted and from which he jumped in order to save himself, fracturing the patella of his right knee. He had the injured part strapped with adhesive plaster, and it had so far healed that he was able to move about his room. He was taken

seriously ill on the sixth of September, the physician was summoned and he died within a space of about five minutes after the physician reached him, as the result, as the physician testified, of cerebral hemorrhage. There was no doubt but that compensation was due him in his lifetime, and on November 29, 1916, the matter of compensation for his disability seems to have come on informally, together with the present application for death benefits, and an award was made for disability amounting to sixty-nine dollars and twenty-five cents to be paid as soon as the widow had had herself appointed administratrix of the estate. Such an appointment was subsequently made and the compensation for disability was paid. On the same date the Commission made an award for death benefits, three Commissioners sitting. The matter now comes on before the full Commission upon the application of the insurance carrier for a rehearing.

The only question to be determined is whether Mr. Barnes' death was the result of his injury.

James T. Driscoll, for claimant.

C. A. Worm, for insurance carrier.

LYON, Commissioner.—It would seem to be carrying the idea of cause and effect to extremes to find that death from cerebral hemorrhage is traceable to the mere fracture of the patella of the knee, and if that were all there is in the case, perhaps no one would seriously contend that the causal relation had been traced. There is, therefore, an attempt on the part of the attorney for the claimant to conjoin with the injury to the patella proof that the deceased suffered at the same time a concussion of the brain. I have been over the record with a good deal of care, and I am unable to see any such proof in the case. Dr. Belzer, the physician who treated the deceased immediately and until the time of his death, made out the death certificate in which he gave as the cause of death, "cerebral hemorrhage; contributory — general arterio sclerosis." On September eighteenth he made an affidavit in which he says:

"Deponent further states that he attended to Mr. Henry W. Barnes, an employee of Alexander Utrecht, for injury that he

received under date of July 24th, 1915, said injury being a transverse fracture of the right patella, with contusion of the knee joint.

"Deponent further states that Henry W. Barnes was progressing very favorably, and was able to be up and around, and walk around daily with the aid of a crutch, and that under date of September 6, 1915, the said Henry W. Barnes died from a cerebral hemorrhage.

"Deponent further states that the fracture of the right patella, which caused Mr. Barnes' disability, had no connection whatsoever with the condition that caused his death."

On November 29, 1916, more than a year after these papers were signed by this doctor, he was called to testify before the Commission, and testified as follows: "Q. Doctor, what date was it when you first went to attend Mr. Barnes? A. The day after the accident I believe; July 21st, to be exact. Q. What condition did you find at that time? A. He had a contusion of the forehead and fracture of the patella or knee cap. Q. Tell what you did. A. This thing was all swelled up and quite a bit of hemorrhage underneath the skin; in fact, it was black and blue from above the knee down to the ankle and I put him at rest and as there was some objection about the hospital he did not go so I put him in adhesive straps to hold these two fragments together, I mean together as far as possible for the union as you know in such cases it would probably be only a ligamentous union as very seldom you get a bone union unless it is wired. He was lying in bed and on a couch part of the time and was quite quiet for a couple of weeks and then he began to hobble around a little bit, here and there, for a couple of weeks longer. Then I was called one morning and found him sitting on the edge of the bed synotic — blue, and he could hardly breathe. I tried to remedy that but, apparently, to no avail for in about three or four minutes he was dead. Q. What did you diagnose the death as? A. Cerebral hemorrhage."

A little further on he was asked: "Q. Is it not reasonable to assume that Mr. Barnes would have lived for more than seven weeks after July 20th if he had not sustained a fractured patella,

concussion of the brain with incidental congestion and the contusions on his head? A. Yes, it is reasonable to presume that."

It will be noticed that in this question the idea of a concussion of the brain appears for the first time. So far as I can see from the record there was no evidence whatever that the deceased had any concussion of the brain. In fact, there was almost no evidence that he even had any contusion about the head and the hearsay evidence, admitted at the instance of the claimant, goes to disprove even a contusion of the head. The report of Dr. Belzer, the same attending physician, states, in answer to the question: "Q. State in patient's own words how accident occurred?" the following: "I was coming down stairs when I stepped on a board placed on one of the stair treads. This tipped up and I landed about five steps below on my feet, but noticed an intense pain in my knee."

The same doctor testified: "Q. Now doctor, going back to the condition that you found when you attended Mr. Barnes, did he complain of any injury to his head? A. I recall that he said he had a little bruise or something. I did not pay any attention to it. I remember he said something about a bruise, I don't recall as a physician where it was. Q. You don't remember that you saw it? A. No, I don't."

It will thus be seen that the weight of testimony at least is entirely against the proposition that the deceased had concussion of the brain or anything of a serious nature amounting even to a contusion. All the medical testimony given by experts in favor of the claimant was based on the same question covering a *concussion* of the brain. It is very clear from the testimony of the injured man himself that he did not fall but jumped and struck on his feet, the distance covered being some five steps. I am entirely unable to connect cerebral hemorrhage, from which he confessedly died, with this accident which had little or no reference to any injury to any other part of his body than his knee, and I advise that the award already made be rescinded and the claim for death benefits dismissed.

On October 18, 1917, the Commission passed on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of JENNIE LEESMAN, Widow, for Compensation under the Workmen's Compensation Law, against DREW BROTHERS, INCORPORATED, Employer; UNITED STATES CASUALTY COMPANY, Insurance Carrier

Case No. 61369

(Decided October 18, 1917)

Injuries sustained by the husband of claimant, resulting in his death, while employed by Drew Brothers, Incorporated.

The only question herein is one raised by the insurance carrier as to the rate of compensation. The daily wage of the deceased was \$4.50. An award was made on the maximum allowed by law of \$100 per month. Subsequently, however, the insurance carrier offered evidence that the deceased had worked during the year preceding his death 274 days and earned the gross sum of \$1,113.29. Based upon these figures it claims that this amount should be divided by fifty-two in order to arrive at the weekly wage, which would make the weekly wage \$21.41 instead of \$23.08. *Held*, that the proposed method of determining the weekly wage could not be sustained under the statute; that the "average annual earnings" cannot be taken to be the actual amount which the injured employee earned during the year preceding his accident but must be determined under subdivisions 1, 2 and 3 of section 14 of the statute, in each of which subdivisions the method of arriving at the "average annual earnings" is set forth; that the Compensation Law contemplates seeking the earning capacity of the injured person rather than his actual earnings. The award already made has brought out the correct result whether it be based on an average wage of \$4.06 per day for the days actually worked, or on a larger wage which was admitted to be correct by both the employer and employee. Award confirmed.

This is a death case and claim is made by the widow and minor son of the deceased for compensation. The only question raised by the insurance carrier is as to the rate of compensation. Both the claimant and the employer stated in their notices to the Commission that the daily wage of the deceased was \$4.50. On these admissions, there being no evidence to the contrary, an award was made on the maximum allowed by the law of \$100 per month. The insurance carrier, however, subsequently appeared and

[Vol. 14]

State Industrial Commission

offered evidence showing that the injured man worked during the year preceding his decease 274 days and earned the gross sum of \$1,113.29. It is the claim of the carrier that this sum of \$1,113.29 should be divided by fifty-two in order to arrive at the weekly wage of the decease, which would make the weekly wage \$21.41 instead of \$23.08.

Claimant in person.

W. H. Hotchkiss, for insurance carrier.

LYON, Commissioner.— I do not think the method of determining the weekly wage proposed by the insurance carrier can be sustained by the statute. It is true that subdivision 4 of section 14 of the Compensation Law provides that the "average weekly wages" shall be one-fifty-second part of the "average annual earnings," but I think the "average annual earnings" cannot be taken to be the actual amount which the injured employee earned during the year preceding his accident but must be determined in the manner provided in subdivisions 1, 2 and 3 of section 14, in each of which subdivisions the method of arriving at the "average annual earnings" is set forth.

Subdivision 1 of section 14 provides that where the injured employee has worked "substantially the whole of the year immediately preceding his injury his average annual earnings shall consist of three hundred times the average daily wage or salary that he shall have earned in such employment during the days when so employed." It is admitted here that the deceased worked substantially the whole of the year immediately preceding his injury; that is to say, that 274 days of service is a substantial year's work, and no question is made by the insurance carrier but that this is the fact. It will be noticed in the quotation already made that the average daily wage is to be found by dividing the yearly earnings by the number of "days when so employed." If the total yearly earnings in this case, namely, \$1,113.29 be divided by 274 it gives an average daily wage for the days

actually employed of \$4.06. Multiplying this by 300 gives an average annual wage of \$1,218, which is more than \$100 per month, and, therefore, makes the weekly basis of \$23.08 upon which the compensation has already been figured, the proper one.

It seems to me that the insurance carrier's error in its method of computation arises out of a misapprehension of the exact intent of the Compensation Law. We are not interested *per se* in determining earnings of the deceased in this case during the year preceding his death. What the Compensation Law apparently is seeking is to give compensation to the deceased's dependents for a certain proportion of what it may be presumed he would have earned during the weeks subsequent to his injury. That he worked only 274 days in the year preceding his death is no reason for supposing that he would not have worked more than that length of time during the next year if he had lived and had had no injury. It appears to me that we are seeking here not so much the actual earnings of the deceased, as his wage earning capacity, and the fact that he happened, during the preceding year, to work 26 days less than the 300 set up as a standard by the act, is a mere incident. What the act contemplates is that we shall find what his capacity to earn was rather than his actual earnings, and then presuming that his capacity would have remained the same for the future weeks, base compensation on that. Now the deceased's capacity to earn money of course is determined not by the number of days which he was able to secure employment, but by the rate of his pay for the days when he did work and such is the exact wording of the law, namely, "his average annual earnings shall consist of three hundred times the *average daily wage* or salary which he shall have earned in such employment *during the days when so employed.*" Having determined the average wage earning capacity, per day, of a man who worked substantially the whole of the year preceding the injury, there is, I think, a conclusive presumption that the injured man, but for his injury, would have worked 300 days per year during the term of disability, or so long as compensation is payable, and this is the basis of an award under the statute.

What the legislators apparently had in mind when they adopted the rules laid down in section 14 was to make a rule somewhat arbitrary in itself, which would work out average justice and be simple and easy of application in the multitude of cases which come before the Commission. Of course a healthy and ambitious workman might work more than 300 out of 313 working days of the year, and such a workman who is put on the basis of 300 working days receives somewhat less compensation than his actual earnings would warrant, whereas the workman who works for any reason less than 300 days in the year, provided he works a sufficient number of days to make a finding that he has worked substantially the whole year proper, receives some advantage over his actual earnings. It is probable, moreover, that the Legislature foresaw the administrative difficulties which would confront this Commission if some simple and easily applied rules were not adopted, making it unnecessary to take voluminous testimony in each case to arrive at the injured workman's actual earnings.

It is difficult to see how a Commission passing on 60,000 cases a year, as this Commission does, could possibly go into the determination of the earnings of employees, if every case had to be tried out on the actual facts. The statute, therefore, makes a very easy and simple rule based on the actual earnings of the injured man for the preceding year, if he has worked substantially all the time during that year, and if not, on the average earnings of another workman in a similar employ and in the neighborhood who has worked substantially all the year.

In my opinion the award already made has brought out the correct result whether it be based on an average wage of four dollars and six cents per day for the days actually worked, or on a larger wage which was admitted to be correct by both the employer and employee, and I advise that the award be confirmed.

On October 18, 1917, the Commission passed on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of MYRA B. CAMERON and SARAH CAMERON, Alleged Widows, for Compensation under the Workmen's Compensation Law, for the Death of WILLIAM CAMERON, against ACHESON GRAPHITE COMPANY, Employer; UTICA MUTUAL COMPENSATION INSURANCE CORPORATION, Insurance Carrier

Claim No. 1923

(Decided November 15, 1917)

Injuries sustained by William Cameron, resulting in his death, while employed by the Acheson Graphite Company.

On July 21, 1916, William Cameron, while employed by the Acheson Graphite Company, sustained injuries in the course of his work which resulted in his death. The only question now before the Commission grows out of the fact that two different women make application as his widow for compensation. Myra B. Cameron on March 1, 1904, married one Emory H. Bouk and resided in the province of Ontario, Canada. The following year Bouk established his residence in South Dakota and brought an action for divorce against Myra Bouk on the ground of desertion. Under an order of the court a summons was served upon the defendant in Canada by leaving a copy at her last known place of residence. In that action a decree was granted divorcing the parties absolutely on December 18, 1905. Thereafter and on June 30, 1906, Myra Bouk married the deceased. On June 3, 1915, deceased intermarried with Sarah Cameron, one of the claimants herein, on the theory apparently that the divorce procured by Bouk against Myra Bouk in South Dakota was void for want of jurisdiction, rendering his, Cameron's, prior marriage to Myra void. Thereafter Myra Cameron began a suit in Niagara county, N. Y., for an absolute divorce from the deceased for the offense named in the New York statute, making Sarah Cameron the correspondent. An interlocutory decree of divorce was granted by the Supreme Court in Niagara county on April 27, 1916, to become absolute if objections were not raised within three months thereafter. Before the three months had elapsed and on July 21, 1916, Cameron met his death from an industrial accident.

Held, that Myra, having been a non-resident at the time and the South Dakota court having assumed and exercised jurisdiction under the provisions of the Federal Constitution, "that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of any other state," it must be held that the South Dakota divorce secured by Bouk against Myra B. Bouk was valid, and she was free to

[Vol. 14]

State Industrial Commission

marry the deceased Cameron. The interlocutory decree divorcing Myra Bouk from Cameron was not effective to dissolve the marriage tie because it was only interlocutory and was to become absolute only after the expiration of three months. It follows that the marriage between the deceased and Sarah was illegal and gave neither her nor her child any standing herein. An award was made to Myra B. Cameron as widow. Also held that as to the rate of compensation the average for the year must be taken and not the average for the period during which deceased received the highest wage.

Claim is made by each of two alleged widows for compensation growing out of the death of William Cameron on July 21, 1916. The question to be determined is, which of the two has established the fact that she is the widow of the deceased. The claimant Myra B. Cameron, on March 1, 1904, married one Emory H. Bouk. After their marriage Mr. and Mrs. Bouk resided in the province of Ontario, Canada. In 1905 Emory H. Bouk established his residence in South Dakota and brought an action for divorce against Myra Bouk, on the ground of desertion. Summons could not be served on the defendant in the suit in the State of South Dakota, and, in pursuance of an order of the court, it was served on her in Canada by leaving a copy at her last known place of residence. On return of the process with proof of such service and in the usual course of proceedings, a decree was granted divorcing the parties absolutely on December 18, 1905. Thereafter, and on June 30, 1906, Myra Bouk married the deceased. On June 3, 1915, William Cameron, the deceased, intermarried with Sarah Cameron, one of the claimants, on the theory apparently that the divorce procured by Emory H. Bouk against Myra Bouk in South Dakota was void for want of jurisdiction, rendering his, Cameron's, prior marriage to Myra on June 30, 1906, void. Thereafter, Myra Cameron began a suit in Niagara county, N. Y., for an absolute divorce from the deceased for the offense named in the New York statute, making Sarah Cameron the corespondent. An interlocutory decree of divorce was granted by the Supreme Court in Niagara county on April 27, 1916, the same to become effective and an absolute decree to follow, if objections were not raised within three months thereafter. Before the expiration of

the three months and on July 21, 1916, William Cameron met his death from an industrial accident.

The question to be determined is, which of the two claimants is the lawful widow of William Cameron.

Watts, Stockwell & Hunt, for Myra B. Cameron.

Leggett & Thibaudeau, for Sarah Cameron.

Hart, Stevenson, Walton & Senior, for insurance carrier.

LYON, Commissioner.—It is well settled in this State that the plaintiff in a divorce suit in another State can confer upon the court no jurisdiction to grant a decree of absolute divorce by the service, in the State of New York, of process issuing from the other State, where the defendant neither answers the complaint nor appears in the action. If Myra B. Bouk had been a resident of the State of New York when the summons in the South Dakota divorce was served upon her and had been served in the State of New York by substituted service, there can be no doubt but that the courts of this State would hold the decree of divorce which followed to be absolutely void. The theory upon which such decision is based seems to be a protection of the citizens of the State of New York. It does not follow, however, that the same rule would apply where the service is made upon a non-resident of the State of New York and at the place of residence. The papers before us show that the South Dakota court had proper proof of service upon Myra B. Bouk, such as it was, and assumed and exercised jurisdiction which it must be presumed was in the regular course of judicial procedure. The Constitution of the United States provides (§ 1, art. 4): "That full faith and credit shall be given in each state to the public acts, records and judicial proceedings of any other state."

I think under the circumstances here presented this mandate is controlling upon us and that we must give, for the purpose of this proceeding, full faith and credit to the South Dakota divorce secured by Emory H. Bouk against Myra B. Bouk. Furthermore,

[Vol. 14]

State Industrial Commission

it would seem that this has already been passed upon by our Supreme Court for the interlocutory decree of divorce granted Myra Bouk against William Cameron on April 27, 1916, must have been based upon a finding that she was the lawful wife of William Cameron, which could not be the case unless the divorce granted Emory Bouk in South Dakota was valid. I think also that the interlocutory decree divorcing Myra Bouk from William Cameron on April 27, 1916, was not effective to dissolve the marriage tie, because by its terms it was only interlocutory and was to become absolute only after the expiration of three months. No absolute decree has ever been entered. I am, therefore, of the opinion that the marriage between the deceased and Sarah on June 3, 1915, was illegal and gave her no status as wife and leaves her now no standing as widow. It follows that the posthumous child born to her is also barred from compensation because at the time of Mr. Cameron's death the statute did not recognize the rights of illegitimate children. I, therefore, advise that an award be made to the claimant Myra B. Cameron.

Some question is raised as to the rate of compensation. It appears that the deceased had his wages raised two or three times during the year immediately preceding the accident, although he did not change the nature of his service. It is stated that from June 30, 1915, to January 1, 1916, his wage was three dollars and twenty-five cents per day; from January 1, 1916, to May 30, 1916, three dollars and thirty-eight cents per day; from May 30, 1916, to July 17, 1916, three dollars and fifty-eight cents per day, and from July 17, 1916, to October 9, 1916, four dollars and ten cents per day. I think under section 14 of the Compensation Law, the total amount of earnings during the year immediately preceding his accident must be worked out on this basis and when the total for the year has been ascertained, it must be divided by fifty-two to get the weekly wage; that is to say, his actual earnings during the year preceding his accident must be figured out day by day so as to get an average of his daily wage, which multiplied by three hundred and divided by fifty-two would give his weekly wage. It will be noticed that this will be considerable less

than the earning power at the time of the accident and it may be said under the decision in the case of *Minniece v. Terry Bros.*, decided by the Commission in November, 1916, and subsequently affirmed by the Appellate Division, the rate at the time of accident should govern, but I think this is not so. The *Minniece* case was decided on the theory that the injured workman had two sorts of employment and had different rates of wages. During the brick season he received a higher wage and during the winter months, when brick could not be made, he worked as a common laborer at a lower wage. Having received his injury while brickmaking, the Commission held that it was a brickmaker's wage which was to govern, and the average rate of a workman in that vicinity, working substantially the whole of the year at brickmaking, was taken as a basis. Here, however, there was no difference in the nature of Mr. Cameron's employment. It was the same during the whole year, but the rate of wages of that employment was increased, and I, therefore, think that the average for the year must be taken and not the average for the period during which he received the highest wage.

On the 15th day of November, 1917, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of EKATERINI STAGURNOS, Mother, and Her Two Daughters, for Compensation under the Workmen's Compensation Law, for the Death of JAMES STAGURNOS, against TUNNESSASSA LUMBER COMPANY, Employer; FIDELITY AND CASUALTY COMPANY, Insurance Carrier

Death Claim No. 21914

(Decided November 15, 1917)

Injuries sustained by James Stagurnos, resulting in his death, while employed in cutting down trees by the Tunnessassa Lumber Company.

On July 27, 1914, James Stagurnos, while in the employ of the Tunnessassa Lumber Company, was cutting down trees when a falling tree

struck him, fracturing his skull and resulting in his death on that day. Stagurnos was a Greek and the claimant, his mother, a resident of Greece, asks for compensation for herself and two daughters. This case has been before the Commission for some time and once an award was denied for insufficient proof of dependency, but the case was left open for the reception of supplementary proof. This has now been submitted and the case is now before the Commission for final decision. The deceased was hired by one Raptas. The lumber company in question had the timber rights on a large area of land and contracted with one John J. Smith to cut and pile cord wood at a given rate. The company neither hired men nor had any control whatever over the men hired by Smith. Smith hired several gangs of men to do the work at a figure of fifteen cents a day lower than that he received for their labor. Immediately upon the death of deceased Raptas came to Smith and the two arranged for Raptas to throw up his contract and Smith paid him in full for all the work he had done.

The only question now before the Commission is as to whether the proofs of dependency have now been supplemented so as to make an award proper, and, if so, against whom it should be made. *Held*, that the testimony was sufficient to make out a case of dependency. As to who should pay this, also *held*, from the facts shown, that Smith's arrangement with Raptas was merely a convenient way of hiring the whole gang and that Smith was the employer. As to Smith's relations with the company, he was an independent contractor and as employer of deceased the award should be made against John J. Smith and denied as against the Tunnessassa Lumber Company. Claim allowed against John J. Smith and denied as against the Tunnessassa Lumber Company.

Claimant, the mother of James Stagurnos, a resident of Greece, makes claim for compensation for herself and two daughters, sisters of James Stagurnos, for compensation growing out of his death on July 27, 1914, as the result of an accident.

Deceased was cutting trees and a falling tree struck him, fracturing his skull, resulting in his death on the same day.

The case has been long under consideration and an award of compensation was once denied on the ground that there was no sufficient proof of dependency, but the case was not closed, being left open for the purpose of having the proofs of dependency supplemented if possible. Such proof has been submitted and the case now comes on for final decision.

It appears that the deceased was hired by one Raptas. The Tunnessassa Lumber Company had the ownership of, or at least the right to cut timber from a large area of land and in accord-

ance with its custom, made a contract with John J. Smith by which it agreed to pay him one dollar and thirty-five cents per cord for cutting and piling four-foot wood. The testimony is that the lumber company hired no men and had no control whatever over the men after its contract with Smith. Mr. Smith testified that he hired various gangs of men, consisting of six or eight men each, to whom he agreed to pay the sum of one dollar and twenty cents per cord for doing the work.

The deceased was in the gang of men under the supervision of one Raptas, with whom Smith made the contract. Raptas carried no insurance and the testimony is that Raptas immediately after the death of Stagurnos came to Smith and asked to be allowed to throw up his contract and receive such money as was due him. To this Mr. Smith agreed and gave Raptas a check for the sum of forty-six dollars which, with the amount of store bills which Raptas had incurred and which Smith assumed, paid Raptas and his gang in full for the work he had done.

The questions to be determined are whether the proofs of dependency have now been supplemented, so as to make an award proper, and if so, against whom the award should be made.

Soterious Nicholson, for claimants.

Edw. P. Mowton and Mr. McKeever, for insurance carrier.

John J. Smith, employer in person.

LYON, Commissioner.—I am of the opinion that the proofs as they now appear are sufficient to warrant a finding of dependency on behalf of the claimants. There is considerable proof in the record that the deceased sent considerable sums of money to his home in Greece before his death and there are various affidavits from officials and neighbors of the claimants to the effect that they were dependent upon the deceased in his lifetime, as well as affidavits directly from the mother of the deceased. The principal difficulty with the proofs of dependency when the case was first considered arose out of the fact that the mother's affi-

davit stated that the deceased before his death was sending her from six dollars to ten dollars per week for her maintenance, whereas, the deceased's wages were so small as to make it practically impossible for him to live and remit any such sums to Greece. It was, therefore, felt that the affidavit defeated itself. The attorney for the claimants at the time claimed that the affidavit has been mistranslated, or at least contained a manifest error; that the intention was to state that the deceased sent to Greece, not ten dollars per week, but ten drachmas per week. (A drachma seems to be about twenty cents.) The supplemental proofs now in the file consist of two or three affidavits from officials in Greece and a supplemental affidavit from Ekaterini Stagurnos, the mother, stating that her former affidavit was intended to be stated in drachmas and not dollars. While it is true that this correction is one which might very readily be suggested by the fact of the former decision, still I am of the opinion that the great mass of testimony to the effect that the claimants were dependent, in conjunction with the fact that there is proof of sending considerable sums of money by the deceased to his mother and sisters, is sufficient to make it a case of dependency.

The question of employer is a difficult one. The man Raptēs, who is claimed by the insurance company and by Smith to be the employer, is apparently utterly impecunious. Not only so, but he has drawn the small sum of money which was due him and apparently left for parts unknown. At least, he is without the jurisdiction of this Commission. Furthermore, his reason for drawing the money apparently was stated when he drew it, that he wished to throw up the job and leave the State on account of the death of this deceased. I gather from the testimony, too, that Raptēs was not so much an employer of Stagurnos as a fellow partner in the arrangement between the gang and Mr. Smith. While it is true that Mr. Smith testifies that he agreed with Raptēs for a certain price per cord, it is undisputed in the evidence that the gang which Raptēs represented simply cut the wood and divided the price per cord between them.

It seems to me that Mr. Smith's arrangement with Raptēs,

therefore, was nothing more than a convenient way of hiring the whole gang to cut the wood at a price per cord, and that Mr. Smith was the employer of the deceased.

The question arises whether the Tunnessassa Lumber Company may be held to be the employer.

The relationship between this company and Mr. Smith is entirely different from that between Smith and Stagurnos. Mr. Smith is a man apparently of means. He took very large contracts from the Tunnessassa Lumber Company; he had been doing a good many contracts; he not only took the contract to cut wood, but to do the lumbering and hauling to the station and in every way he seems to be a man who is continually taking sub-contracts, and his operations are so large that the hiring of men for the work he does cannot, it seems to me, be held to be an agency for the Tunnessassa Lumber Company.

I am of the opinion, therefore, that an award should be made against John J. Smith and denied as against the Tunnessassa Lumber Company. This is in accord with the opinion of the Appellate Division in *Sullivan v. Preston*, decided at March term, 1917.

On the 15th day of November, 1917, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of MAX LEVINE, for Compensation under the Workmen's Compensation Law, against MAX I. GOLD'S SONS, Employer

Case No. 25712

(Decided November 15, 1917)

Injuries sustained by Max Levine while employed as a general helper in the junk business by Max I. Gold's Sons.

On May 1, 1917, the claimant arranged with the Golds to break up for them a large balance wheel weighing several tons belonging to them and

[Vol. 14]

State Industrial Commission

which they had placed on a vacant lot. Because the Golds' teams were in use Levine agreed to use his own team to carry the pieces of the wheel when broken to their destination. Levine prepared to break up the wheel by a dynamite blast. The fuse lighting appeared, however, to fail and Levine, believing there was no fire at the end of the fuse, went up to the charge and was in the act of pressing some mud over it when the fuse exploded the blast and blew both of Levine's hands off and blinded him in one eye. The two questions here presented are as to whether Levine was employed by the Golds or was an independent contractor, and as to the proper rate of compensation if Levine is found to be an employee. At the time when this accident happened junk dealing was covered by the Compensation Law. *Held*, that Levine was an employee within the meaning of the statute. When he left his business of buying junk and turned to the business of breaking up junk for a wholesale dealer he became an employee of the latter. Also *held* that as to the rate of compensation the claimant must have his compensation fixed by taking as its basis the average earnings of an ordinary helper in the wholesale junk business, and that the case must be continued to have the rate determined. Case continued.

The claimant was in the general business of buying and selling junk. The firm of Max I. Gold's Sons are wholesale junk dealers. On May 1, 1917, the Golds had acquired, among other things, a large balance wheel weighing several tons which they had placed upon a vacant lot. In order to properly handle this large piece of junk, it was necessary that the same should be broken up into pieces small enough so that it could be readily moved. There are several ways of reducing these large pieces to proportions in which they can be handled, such as breaking the pieces with a heavy weight, using an acetylene torch and breaking them up with dynamite. On the first day of May, Levine had started to go about his business of gathering up junk but had returned because of a rain which had set in. Knowing that the Golds had the large pieces of fly wheel to be broken up, he arranged with them to do the work at the price, it is stated, of five dollars. Since the Golds' teams were in use, Levine agreed to use his own team to carry the pieces of the wheel when broken to their destination. One of the Golds and one of their employees accompanied Levine to the place where the breaking was to be done, the three having procured dynamite caps and fuses for the purpose of breaking up the wheel by blasting. While Levine's regular business was that of junk dealer, he

seems to have acquired some knowledge of blasting. The three proceeded to their task and worked the greater part of the day and towards night a blast had been arranged to break up a piece of the wheel, but the lighting to the fuse appeared to have failed. Levine, thinking there was no fire at the end of the fuse, went up to the charge and was in the act of pressing down some mud over it, when the fuse, which had not in fact been extinguished, exploded the blast and blew both of Levine's hands off and blinded him in one eye.

There are two questions to be determined. The first is, whether the relation of employer and employee subsisted between Levine and the Golds, or whether Levine was an independent contractor; and the second question, if the first is decided in Levine's favor, is, what his rate of compensation should be.

Duntz & Herzberg, for claimant.

Chace Bros., for employer.

LYON, Commissioner.—The attorneys for both claimant and the Golds have briefed the case on the facts with a good deal of care and differ somewhat as to just how the arrangement between the injured man and the Golds was effected. The attorney for Gold claims that Mr. Levine actively sought the opportunity on this rainy day to earn a few extra dollars by attending to this blasting, that the Golds were not disposed to do anything about breaking up the junk at that time and that Levine was so anxious to have the opportunity that he offered of his own motion to supply the Golds with teaming facilities by using his own horse and wagon. They also lay a good deal of stress on the fact that Levine was to do the blasting for the sum of five dollars, that is, a lump sum instead of by day's wages. Considerable is said too about the fact that Levine took the position of directing how the work should be done and in fact showed a good deal of carelessness in approaching the blast which he supposed to have been extinguished, but I am disposed to think that taking everything in connection with the case in the light most favorable to the Golds, it must be found

that Mr. Levine was an *employee* within the meaning of the Compensation Law and not an independent contractor. At the time when this accident happened dealing in junk was covered by the Compensation Law, and at the same time the statute had been amended so as to overcome the decisions in the Bargey and McNally cases, and placed all the employees of an employer whose principal business is hazardous under the Compensation Law. *Dose v. Moehle Lithograph Company*, just decided by the Court of Appeals. The statute in that regard reads (§ 3, subd. 4): "Employee means a person engaged in one of the operations enumerated in section 2 or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment," etc.

There can be no question, therefore, but that the junk business was a hazardous employment at the time of this accident and that all the employees of the junk dealer, whether they were engaged in the junk business proper or only in something incidental to it, were covered by the act. It is quite manifest that junk of the size of this tremendous balance wheel cannot be handled until it is broken up into smaller pieces. For our purposes it does not matter what means are used to accomplish this purpose. Whether it is done by blasting, by breaking it up with a maul, by acetylene torch or by dropping heavy weights upon it, is of little importance. The principal thing to be noted is that the work is done to reduce the junk to proportions which can be handled. I do not think, therefore, that the fact of the junk being broken by blasting has any particular bearing upon the case. The principal business of the employer was not blasting but dealing in junk, and certainly putting the junk into marketable form was incident to that business.

It is to be noted that while Levine apparently had some skill in using the materials necessary for blasting, blasting was not his regular occupation and that he had given up his regular occupation of buying junk for the time being, and for a consideration turned in to help these wholesale junk dealers handle their product. I do not think the fact that he agreed to break the wheel up for a cer-

tain specified sum militates against the position that he was an employee within the meaning of the Compensation Law. When he left his business of buying junk and turned to the business of breaking up junk for a wholesale dealer, I think he became an employee of the latter within the meaning of the Compensation Law. It would not be of much use to attempt to review the decided cases, but I think the Rheinwald case was one which carried the doctrine of employer and employee much farther than this case does and while it is true that the case was subsequently disallowed on the strength of the Bargey case, the doctrine of employment was not disturbed and, as already stated, the effect of the Bargey decision has now been overcome by an amendment to the statute. The master and servant law, as applied to negligence cases, is not controlling here.

The question of the rate of compensation is a somewhat difficult one. Compensation cannot be based on the wages of an expert blaster, because blasting was not the business of either the employer or the employee. Claimant's earnings for the preceding year cannot be used as the basis, because he was not employed for substantially the whole of the preceding year but was in business for himself, neither is buying junk on one's own account the same kind of an occupation as working for a wholesale junk dealer. I think claimant must have his compensation fixed by taking as its basis the average earnings of an ordinary helper in the wholesale junk business and that the case must be continued to have the rate determined.

On the 15th day of November, 1917, the Commission acted upon the foregoing matter in accordance with the foregoing opinion.

[Vol. 14]

State Industrial Commission

In the Matter of the Claim of JOHN M. O'ESAU, for Compensation under the Workmen's Compensation Law, against E. W. BLISS COMPANY, Employer; ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier

Case No. 35053

(Decided November 15, 1917)

Injuries sustained by John M. O'Esau while employed by E. W. Bliss Company.

John M. O'Esau, the claimant herein, on March 28, 1916, while employed by E. W. Bliss Company, in rolling shells along a bench in the course of his business, caught his finger between two shells. The finger was badly hurt but the employer gave him a position as foreman and continued him at his old wages. For some time the injured finger was treated by the employer. Infection set in and his condition has involved the whole arm rendering it almost useless. The infection has become general, blood poisoning has set in and owing to incipient tuberculosis claimant seems destined to complete disability. He worked until April, 1917, and filed his claim with the Commission June 6, 1917. The only question herein is as to whether the claim is barred by section 28 of the statute which places one year as the limit of time within which claim for compensation may be filed with the Commission. Considering the fact that the necessity, not to say possibility, of filing the claim was not apparent so long as claimant could and did perform services at the former rate, and the further fact that the employer was at all times aware of the serious nature of the injury, *held*, that the employer is not in a position to invoke the aid of the limitations set by the statute. An award should be made from the time claimant's wages stopped to date, and the case continued. Award made to date and case continued.

On March 28, 1916, the claimant, according to the employer's first report of injury, which was made two days thereafter, received a contusion of the third finger of the right hand. In answer to the direction, "Describe in full how the accident occurred?" the employer states, "Rolling shells along bench, caught his finger between two shells." The claimant's injury was quite severe and soon incapacitated him from doing his former work, but his employer arranged matters so that with his injured hand he took a position as foreman or overseer and continued working at his old

wages. The injured finger required treatment and he was treated for a considerable period of time by his employer. He was later requested to go to a hospital but did not do so and continued taking treatment from his employer and such treatment as he himself thought necessary. During the time while he was working his finger became infected and the infection finally became very serious. The condition now has spread so as to completely cover his arm and render it almost useless. The infection has become general, he has become anemic, has developed running sores in other portions of his body and is altogether in a very serious condition for a workingman. It is claimed that his blood poisoning has started him on the road to complete disability, owing to incipient tuberculosis. He worked until about April, 1917, and filed his claim for compensation with the Commission on the 6th day of June, 1917.

The insurance carrier resists payment of compensation on the ground that the claim is barred by section 28 of the statute, which places one year as the limit of time within which claim for compensation may be filed with the Commission. This is practically the only question in the case, although the insurance carrier does lay some stress upon the fact that the injured man did not accept its offer of hospital treatment when it was made.

Claimant in person.

T. Carlyle Jones, for insurance carrier.

LYON, Commissioner.— There are two or three general considerations which should be taken up before entering upon the specific questions involved.

The Workmen's Compensation Law in its general features does not look to the payment of damages to an injured employee for industrial accidents. The whole genius of the compensation system, as it seems to me, is based upon the proposition that the question of damages *per se* shall be eliminated and payments shall be made on the basis of reduced earnings or reduced earning capacity, the compensation being paid for the purpose, if the injured man

is capable of being restored to industry, of supplying him and his family with the means of subsistence while he is either recovering from his injury or, if his injury is such as to incapacitate him for his former employment, while he is learning to perform other services which his injured condition makes possible.

The whole theory of the law, therefore, pre-supposes a reduction in earning power before anything arises which the Industrial Commission can take cognizance of. Perhaps this statement should be qualified when we take into consideration the payments made for dis-memberment. A man, for instance, who loses the sight of an eye is to be paid 128 weeks' compensation, though he go back to work at his old wages the day following his accident, but I do not think that this militates against the general theory of the law, his compensation in that case being apparently based on a conclusive presumption that his earning capacity will be diminished in the course of his lifetime by what would be equivalent to 128 weeks' compensation. If this theory of the law be correct then the claimant in this case had no claim for compensation in the real acceptance of that term, so long as he was able to earn, either at his old employment or at his changed employment, his former rate of wages, and this concededly continued until April of the year 1917, and for more than a year after his injury.

If the claim of the insurance carrier, therefore, is correct and our theory of the Compensation Law is true, Mr. O'Esau's claim for compensation was barred before it ever arose and the statute had run before he was in position to file his claim for compensation with this Commission at all.

We have also to take into consideration the fact that the courts have held that the Compensation Law is remedial in its nature and is to have a very broad and liberal construction, in order that the benefits flowing from it to injured men may be properly secured, the employer being in theory, at least, properly reimbursed for all such payments by having the cost of compensation thrown upon the ultimate purchaser. It is also to be noted that in this case the injured workman stands in a position with reference to his compensation entirely different from that which workmen sometimes

assume. It is sometimes found that injured workmen do not attempt to perform such service as they are able when they are temporarily put out of their regular employment. Mr. O'Esau, however, while he was injured severely enough so that he might well have ceased working entirely until recovered, manifested a proper disposition both to keep his earnings at their maximum and relieve his employer from the necessity of paying compensation without receiving anything in the way of service. He certainly worked for many months with a concededly bad hand and one which would have led most workmen to have ceased employment altogether. He should not be penalized for so doing. The claimant, therefore, stands in the best possible relation to the scheme of compensation when he asks the Commission to overlook his failure to file his claim for compensation at an earlier date, and it seems the Commission is fully warranted in going as far as possible to relieve him from his failure to file his claim earlier, and I think it is in this spirit that the approach must be made to this claim.

It is a well-settled general rule that a defendant who has not expressly waived the defense of the Statute of Limitations may be estopped by his conduct from setting up the statute, where his conduct, though not fraudulent, has nevertheless directly induced the plaintiff to delay bringing suit until after the expiration of the statutory period. 9 Am. & Eng. Ann. Cas. 755.

In *Brookman v. Metcalf*, 4 Robt. (N. Y.) 568, it appeared the defendant owed the plaintiff upon two promissory notes. The defendant in order to induce the plaintiff not to sue upon the second note promised the plaintiff that he would abide the result of the decision in a pending suit on the first note. Influenced by such offer the plaintiff delayed bringing an action upon the second note until after the decision of the action upon the first note and until after the bar of the Statute of Limitations had attached. The court said: "It seems to me, upon the doctrine of equitable estoppel or estoppel *in pais*, the defendant ought not to be allowed to disregard his engagement and set the statute up as a defense. * * * It is not necessary to an equitable estoppel, that the party should design to mislead. If his act was calculated to mis-

lead, and actually has misled another who acted upon it in good faith, it is enough."

Mr. Parsons in his work on Contracts says: "When a man has made a declaration or a representation, or caused, or, in some cases not prevented, a false impression, or done some significant act, with intent that others should rely upon it and act thereon, and upon which others have honestly relied and acted, he shall not be permitted to prove that the representation was false, or the act unauthorized or ineffectual, if an injury would occur to the innocent party, who acted in full faith in its truth or validity." 2 Pars. Cont. 340.

In an action for personal injuries, a promise of settlement will stop the running of the statute, or, in other words, where the claimant is led to postpone his suit by the statement of the defendant to the effect that a suit will be unnecessary, the defendant will be estopped to plead the Statute of Limitations when subsequently sued. *Renackowsky v. Water Comrs.*, 122 Mich. 613.

Where a claim was properly filed against the estate of a decedent, except that no notice was served on the administrator as required by statute, but the administrator made a partial payment and offered to pay the balance in real estate, it was held that the administrator was estopped by his acts from setting up the Statute of Limitations. *Wilson v. McElroy*, 83 Iowa, 593.

Where a debtor, at his creditor's request, made a payment to a third person, and by his conduct led the creditor to believe that such payment was intended as a payment on the debt which he owed the creditor, and that it therefore arrested the running of the Statute of Limitations, and the creditor refrained from suing because of his reliance in such conduct, it was held that the debtor was estopped to deny that the payment was so intended. See, also, *Armstrong v. Levan*, 109 Penn. St. 177; *Bridges v. Stephens*, 132 Mo. 524; *Daniel v. Board of Comrs.*, 74 N. C. 494; *Swofford Bros. v. Goss*, 65 Mo. App. 55.

Following these opinions and decisions and having in mind the serious nature of claimant's present condition, and the fact that the necessity, not to say possibility, of filing the claim was not

apparent so long as claimant could, and was willing to, perform service at his former rate, and the further fact that the employer was at all times aware of the serious nature of claimant's injury, I am of the opinion that the employer is not in a position to successfully invoke the bar of the statute.

It is true that claimant did not fully accept the medical attendance offered him by the employer, which would perhaps have lessened the period of his disability, but the statute gives the injured employee the right to exercise his own judgment in that respect, at least to the extent here shown.

There should be an award from the time his wages stopped to date, and the case continued.

On the 15th day of November, 1917, the Commission acted upon the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of CARL LECZOWSKI, for Compensation under the Workmen's Compensation Law, against T. LAFAVE & BELLINGER, Employer; LONDON GUARANTEE AND ACCIDENT COMPANY, Insurance Carrier

Case No. 72850

(Decided November 15, 1917)

Injuries sustained by Carl Leczowski while employed as a lumber jack by T. LaFave & Bellinger.

On October 5, 1914, the claimant, Carl Leczowski, while working as a lumber jack for T. LaFave & Bellinger, lumber men, was assisting in skidding logs with other men aided by a team. In moving a log a chain broke and the log rolled back injuring claimant seriously. The first notice of the claim was filed with the Commission on February 3, 1917, and on March 29, 1917, another claim was filed with the Commission. No written notice of the accident was ever served on the employer. The insurance carrier holds that the claim is barred under section 28 of the statute because not filed with the Commission within one year after the injury. *Held*, that the employer and insurance carrier were not prejudiced by the failure to give the written notice required by section 18. Under

[Vol. 14]

State Industrial Commission

section 28 of the law, however, the failure to give such notice is a full protection to the employer as there is nothing in the record to show that the employer or insurance company had any knowledge that a claim for compensation would be presented. Award denied on the ground that the claim is barred by the Statute of Limitations.

The claimant was what is known as a lumber jack working for LaFave & Bellinger, lumber men, and on the 5th of October, 1914, was assisting in skidding logs with other men and with the help of a team. In moving a log on to a pile of other logs the chain, or something connected with the process, slipped, and the log rolled back striking the claimant in the abdomen. The claimant stayed about the work for the balance of that day, was taken at night on horseback to the logging camp about three miles, and was thereafter taken by the foreman of his employer, or someone at the foreman's instance, to the hospital in Utica where he was attended and his accident turned out to be of a serious character.

The first notice of a claim for compensation was filed with the Commission on February 3, 1917, and on March 29, 1917, another claim was filed with the Commission. No written notice of the accident was ever served on the employer.

The insurance carrier resists the payment of compensation on the ground that it is prejudiced by the failure to give written notice of the accident and that the claim is barred under section 28, because not filed with the Commission within one year after the injury.

Edward Hanagan, for claimant.

A. G. Senior and W. C. Tucker, for insurance carrier.

LYON, Commissioner.—The claimant had a painful injury which concededly arose out of and in the course of his employment and of which the employers through their duly appointed overseer had immediate knowledge. The claimant was found by the man in charge of the work to be so seriously injured that he was sent on the day following his accident to a distant city for medical treatment, and I think under many decisions made by the Commission

it must be found that the employer and insurance carrier were not prejudiced by the failure to give the written notice required by section 18.

The Commission has frequently held that there are two main reasons why the employer should have the notice required by section 18, that he may have the opportunity to investigate and determine whether an accident happened and offer medical treatment to minimize his loss. In these respects he certainly cannot have been prejudiced in this case by not having written notice, because those who represented the employer not only knew of the accident, but gave the requisite medical treatment. The question of the bar of the statute, however, is a different one and it seems to me that section 28 of the law is fatal to this claim. The Commission has held in cases heretofore that it is possible for an employer to so comport himself toward an injured employee as to estop himself from pleading the Statute of Limitations, as, for instance, where the injured employee is either kept on the payroll until the expiration of a year or is in some way lulled to sleep on his rights, or misled by the employer, but I think on all the evidence in this case, such cannot be the finding here. It is true that the claimant gave some testimony which might be construed into a statement made by the attorney for the insurance company, that his claim for compensation was being looked after by the company itself. The attorney, however, went on the stand and absolutely denied that anything of the kind took place, stating that the only thing that he was interested in was the question of the doctor's bill that had been presented, and there is nothing in the record except some rather doubtful testimony from the claimant himself, which would go to show that the employer or insurance company had any knowledge that a claim for compensation would be presented.

I can find nothing in this record which would work an estoppel against the employer and insurance company. The claim for compensation certainly arose on the 5th of October, 1914, or at least two weeks thereafter, for the man was incapacitated at once, and I can find no reason for holding that the statute, which places a bar to the claim at the expiration of one year, should not be held to be

[Vol. 14]

State Industrial Commission

effective where the claim for compensation was confessedly not filed for more than two years after it arose.

I think an award must be denied on the ground that the claim is barred by the Statute of Limitations.

On the 15th day of November, 1917, the Commission acted upon the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of HARRY SIERSTED, for Compensation under the Workmen's Compensation Law, against LEINHOS, ENGELKE & BOCK, Employers; HARTFORD ACCIDENT INSURANCE COMPANY, Insurance Carrier

Case No. 70042

(Decided November 27, 1917)

Injuries sustained by Harry Siersted while employed by Leinhos, Engelke & Bock.

On April 17, 1917, Harry Siersted, while employed by the firm of Leinhos, Engelke & Bock, was sent out on an errand. Ordinarily he used the stairs. On the day in question in coming down the stairs he passed a single passenger elevator which was open, the operator standing near the street door at the time. Claimant stepped into the open elevator, the floor of which was not identical with the floor of the building. He fell and struck the starting mechanism of the car, causing it to go up, and his body became caught between the floor of the elevator and the top of the elevator door. The claimant sustained injuries which are permanent in character and he will undoubtedly be an invalid for life. *Held*, however, that the accident had no connection with the boy's employment. To recover not only must it appear that the accident arose in the course of the employment but out of the employment. The boy had no business in the elevator and the award must be denied and the claim dismissed. Award denied and claim dismissed.

This is a claim for injuries sustained by the claimant, Harry Siersted, on April 17, 1917, in an elevator in the building in which he was employed. The injuries are permanent in character and the claimant will doubtless be an invalid for life.

On the day in question claimant was sent out on an errand. The firm for which he worked occupied the second floor of the building and he customarily used the stairs. He came down the stairs and passed the single passenger elevator which was open, the elevator operator standing near the street door at the time. For some reason claimant stepped into the open elevator. The floor of the elevator seems not to have been on the identical level with the floor of the building; claimant miscalculated the distance and fell. In so doing, it appears he struck the starting mechanism of the elevator causing it to go up and his body became caught between the floor of the elevator and the top of the elevator door.

Dayton & Bailey (James A. Dayton of counsel), for employer and insurance carrier.

SAYER, Commissioner.— There is no doubt but that the accident to the claimant herein arose during the course of his employment. It is seriously contended, however, that the accident did not arise out of the employment. The claimant was sent out on an errand. He was a boy sixteen and a half years of age. In passing out of the building, it was necessary for the claimant to pass the open door of the single passenger elevator. It was not necessary for him to go into the elevator, nor did he have any duty that took him into it. He did, however, step aside and step into the elevator.

On April twenty-third claimant signed an affidavit in which he said: "On my way downstairs to entrance to building before passing entrance to elevator, I pushed buzzer and intended going into elevator and fool elevator operator who was standing in door way."

At a special hearing held at the hospital where the claimant was confined, he said that he did not push the buzzer and that he did not know why he stepped into the elevator. He testified he did not run the elevator; that he had no occasion to go in it; there was nobody in the elevator at the time. He testified before the Deputy Commissioner: "Q. Why did you go in the elevator? A. I don't know why I went there. Q. You had no reason for going there at all? A. No, sir. Q. Did you press the buzzer? A. No, sir. Q.

[Vol. 14]

State Industrial Commission

You didn't ring the bell at all? A. No, sir. * * * Q. Why did you step in there? A. I don't know why I stepped in there, I cannot really tell that. Q. You were on your way out of the building? A. Yes, sir."

And in another place: "Q. Just an impulse that you jumped in there? A. Just wanted to step in there, that's all. Q. Boyish play? A. That's all; I didn't mean any harm."

Sad as such a case as this is, and tragic as its results may be, I cannot see from the evidence that the accident had the slightest connection with the boy's employment. In order to charge the employer with responsibility under the Compensation Law, it is not only necessary that the accident should arise in the course of the employment, but that it should arise out of the employment. I cannot see by any stretch of the imagination how it can be seriously contended that this accident arose out of the employment.

The award must be denied and the claim dismissed.

On the 27th day of November, 1917, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of ANTONIA BORGER DALECKY, for Compensation under the Workmen's Compensation Law, for the Death of ANTONIO DALECKY, against ISIDOR BERKOWITZ, Employer; EMPLOYERS' LIABILITY INSURANCE CORPORATION, Insurance Carrier

Case No. 9218

(Decided December 11, 1917)

Injuries sustained by Antonio Dalecky, resulting in his death, while employed by Isidor Berkowitz.

On February 3, 1917, Antonio Dalecky, while employed by Isidor Berkowitz, sustained injuries resulting in his death, and the claimant seeks to recover compensation for his death on the ground that she was his common-law wife. In 1897, she married one Borger and nine years afterward her husband disappeared and has not since been heard from.

In 1911 or early in 1912, she began living with Antonio Dalecky and claims as a common-law wife. Several children were born to them. From the facts adduced the proof as to a common-law marriage having actually occurred is most unsatisfactory. *Held*, that the most that had been shown was an agreement between the parties for a future marriage and that there was a failure of proof of any present contract of marriage. Award denied on the ground that there is no sufficient proof that claimant is the widow of the deceased.

Claim is made by Antonia Borger Dalecky as widow of Antonio Dalecky on behalf of herself and minor children for compensation growing out of the death of Antonio Dalecky on February 3, 1917. The claimant makes claim as the common-law wife of the deceased. It seems that she was married in 1897 to one Borger, and that in the latter part of 1906 her husband disappeared and has not since been heard from. In the latter part of 1911, or the early part of 1912, Antonio Dalecky and the claimant began living together in the relation, as the claimant claims, of common-law marriage and several children were born to them.

The question whether the decedent's death was caused by his accident is not without its difficulty, but the principal question litigated is whether the evidence is sufficient to warrant a finding that there was a common-law marriage.

Claimant in person.

W. L. Tufts, for insurance carrier.

LYON, Commissioner.— There can be no doubt since the decision of the Court of Appeals in the case of *Ziegler v. Cassidy*, 220 N. Y. 98, that a common-law marriage can be contracted in the State of New York. In the present case there is the usual testimony from acquaintances of the deceased and the claimant to the effect that they lived together as man and wife and that the claimant took the decedent's name and that the two generally passed in the neighborhood as husband and wife. While this is competent testimony to prove a common-law marriage, it is by no means controlling and there must be, I think, in addition to it, some definite

proof that the relationship in its inception was accompanied by an agreement to enter into the relation of husband and wife in words in the present tense. It is not sufficient that the relationship should be preceded by promises between the parties that they will at some future time become husband and wife. The definite contract of marriage must precede cohabitation, or the case will be guided by the rule that a relationship which is meretricious in its inception will be presumed to continue so in the absence of clear proof to the contrary. Guided by these rules, I am unable to see how a contract of marriage was entered into between the deceased and the claimant at the time when they began living together. The claimant's own testimony, it seems to me, negatives any claim that she and the deceased entered into the marriage relation. It is quite true that she states in some places that she and the deceased promised to become husband and wife, but I think, in view of her whole testimony, this was rather a promise to be carried out in the future than a present contract of marriage. The claimant distinctly states that after the injury, not thinking that Mr. Dalecky would die, arrangements were made for a marriage ceremony but that Mr. Dalecky died before it had been consummated. While this may not be conclusive against a prior common-law marriage, it is still some evidence that they did not consider themselves husband and wife before that time. Among other things, the claimant testified as follows: "Q. How did you happen to go to live with Mr. Dalecky? What happened? What did he say to you? A. I didn't say anything to him or he to me. I knew him when he was a young fellow going around. I knew him before my first husband. Q. Tell us all about your going there to live with him. What he said to you and you to him and how you happened to go there. A. How I happened to go there? We said nothing to each other. He says, 'I see you are in hard circumstances, very hard to bring up children. I am going to help you out because the high cost of living is something terrible. I see you have got four little children. I am going to live with you and help you out.' I bore three children to him. I wouldn't put the children in a home. I took that man to help me out. Q. Nothing more was said

between you? A. Nothing more. Q. He didn't say he would be your husband? A. Yes, sir, he did. He was going to marry me."

And again, "Q. He knew you were married? A. He knew about it certainly. He knew that. He knew my husband when he— Q. That was the real reason you didn't marry? A. No, it wasn't that reason. I'll tell you the reason. I hunted high and low. I wasn't sure whether the man was dead or alive. I hunted on Blackwell's Island, the penitentiary and the workhouse, all over, the morgue,— I went all over and couldn't locate him. They answered back probably the man must have been killed by a train and buried as an unknown person. Q. That was the reason you didn't marry at that time? A. I didn't marry because I was afraid. Q. Because you were afraid that your husband was still alive? A. I don't believe he is alive. Q. But at that time you were afraid and that is the real reason you didn't marry? A. That was the reason I was afraid. We didn't want to commit no bigamy."

This testimony, it seems to me, negatives any statement made by the claimant that she and the deceased really entered into an agreement in the present tense to become husband and wife. There was no writing and there were no witnesses to the alleged agreement. It is true the claimant speaks about some brothers and sisters being present at the time, but her testimony in that regard seems to be rather an agreement for future marriage than any arrangement for a present marriage contract.

I do not think the Commission is warranted in making awards to women who establish their relation as widow by evidence as weak and inconclusive as the evidence in this case, and I, therefore, advise that an award be denied on the ground that there is no sufficient proof that the claimant is the widow of the deceased.

In the Matter of the Claim of HENRY W. RIDOUT for Compensation under the Workmen's Compensation Law, against RODGERS & HAGGERTY, Employer and Insurance Carrier

Claim No. 54222

(Decided December 11, 1917)

Injuries sustained by Henry W. Ridout while employed by Rodgers & Haggerty, sewer constructors, in the city of New York.

On November 16, 1914, Henry W. Ridout, while employed by Rodgers & Haggerty and engaged in connecting two sewers in the city of New York, was severely injured by an explosion of gasoline which had leaked into the sewer. On June 9, 1915, the claimant filed with the Commission a notice of election to sue a third party not in the same employ, the third party being Garford Auto Service Company or others operating the Garford Garage at Gerard avenue and One Hundred and Fiftieth street, but reserving to himself and his dependents all further rights and remedies, if any, remaining to him or to them under the provisions of the act. This third party suit was tried and claimant was defeated. He now claims compensation under the law and the claim is resisted by the insurance carrier on the ground of a technical failure on the part of the claimant to file his claim within one year after the accident and on the further ground that claimant has been in a gainful employment since his injury and therefore is not entitled to compensation. *Held*, that the claimant had filed a sufficient claim for compensation within the required year. The reservation of his rights in the notice filed with the Commission was sufficient. The evidence showed that claimant's injuries were very severe and for a considerable length of time debarred him from all laborious work. He has lost the use of one of his hands so far as his former occupation is concerned. Before he was injured claimant was a very high class workman, earning six dollars per day. He is entitled to two-thirds of his former wages after deducting therefrom his actual earnings in his present occupation. Under all the circumstances of this case it is recommended that now as he is in physical condition to earn a considerable portion of his former wages the best interests of all concerned will be served if some arrangement for a definite final settlement of the case by a lump sum could be arranged.

The claimant while working for Rodgers & Haggerty on November 16, 1914, and engaged in connecting two sewers in the city of New York, was severely injured by an explosion of gasoline which had in some way filtered through into the sewer. There is no

claim but that the accident arose out of and in the course of the claimant's employment. On June 9, 1915, the claimant filed with this Commission a notice of election to sue a third party, in the following words: "Please take notice that in the case of my injury by accident on the 16th day of November, 1914, arising out of and in the course of my employment by Rodgers and Haggerty, Inc., of 152nd St. and Harlem River, notice of which has been given to you, I elect under the provisions of section 29 of the Workmen's Compensation Act to pursue my remedy against a third person, not in the same employ, to wit; against Garford Auto Service Company or others operating the Garford Garage at Gerard avenue and One Hundred and Fiftieth street, reserving however to myself and my dependents all further rights and remedies if any remaining to me or to them under the provisions of said act."

On January 11, 1915, a precisely similar notice of election to sue was filed with the Commission. It seems that the suit against the third party was tried and resulted in the defeat of the claimant, or at all events, failed to secure damage for him. Meanwhile, the claimant, being an expert mason, instead of returning to his trade which he claims he was unable to do, entered upon a business for himself in the State of Connecticut where he took contracts of more or less magnitude and in which he was assisted by two or three of his sons, some of whom were becoming expert masons and others were learning the trade. He now comes to us claiming compensation under the law, and the claim is resisted by the insurance carrier on two grounds:

In toto on the ground that the claimant's claim is barred under section 28 of the Compensation Law because not filed with the Commission within one year after the accident, and *second*, in part, on the ground that the claimant has been in a gainful employment since his injury and not entitled to compensation in any event, while so employed.

Robert Stewart, for claimant.

Jeremiah F. Connor, for insurance carrier.

LYON, Commissioner.—I think the claimant filed a sufficient claim for compensation within a year after his accident. It will be noticed that the statute does not provide any form which must be used in making a claim before this Commission. It is true that the Commission's rules provide that claims for compensation shall be made upon blanks furnished by the Commission, but the rule closes with the following statement: "but a writing which sets forth the claims shall not be rejected as insufficient because not upon one of such blank forms, or because not verified." The election to sue, already quoted, specifically states that the claimant and his dependents reserve "all further rights and remedies, if any, remaining to me or to them under the provisions of such act."

This, I think, is a sufficient claim for compensation within the statute and while it would perhaps have been better for the claimant to have filed a claim for compensation on the blanks deemed proper by the Commission, I do not think that his failure to do so is sufficient to warrant the plea of the Statute of Limitations.

Turning now to the question of the amount of claimant's compensation, it is quite evident from the documents and testimony before us that the claimant's injuries were very severe, and that they, for a considerable length of time, debarred him from all laborious work. Our medical department finds that one of his hands, and that too the one which he is accustomed to use most in his business, is still far from its normal condition, having very much less grasping power than it formerly had, and the claimant himself is on record as stating that he cannot use it in his former employment for a longer period than a few minutes or an hour. There is a good deal of difference in the testimony as to just what work the claimant did in the various contracts which he took. Various parties have testified that he seemed to work with his original skill and vigor. Others testified that to their knowledge he could only work a few minutes at a time, thus corroborating the claimant himself, and I think, both on the examination of our medical department and on the Commission's own examination of the claimant's hand, it must be found that he is not and has not been able to do his former amount of work, if indeed what he did

do was up to his former grade of work. His own statement is, that he simply directed the work of his sons and occasionally for a short period did do the high-class work, leaving the bulk of the jobs for less skilled workmen. He also has filed with the Commission papers showing what contracts he took and what success he had in carrying them out. From these figures, it seems, that with one or two exceptions, he made no profit whatever on the contracts if credit is to be given his sons for the work which they did, which I think is only fair.

Our own investigator was sent to Bridgeport, Conn., and did not find the situation very much different from that which the claimant and his witnesses testified to. It is to be noted also that the claimant before his injury was a very high-class workman, his wages being stated to be as high as six dollars per day. This being so, the claimant could earn a considerable weekly wage, running as high as ten or twelve dollars per week and still be entitled to full compensation, since he is entitled to have two-thirds of his former wages paid to him, after deducting therefrom his actual earnings, and I do not see from the record how it can be found that he earned during the time between his injury and the hearings before the Commission, sufficient to reduce his earnings before his injury to less than one hundred dollars per month. I am, therefore, of the opinion that the claimant is entitled to compensation from the date of his injury to date at full compensation, but that he is now in physical condition to earn a considerable proportion of his former wages and that the best interests of all concerned will be conserved if some arrangement for a definite final settlement of the case by a lump sum could be arranged.

In the Matter of the Claim of MAY D, LITTS, for Compensation under the Workmen's Compensation Law, for the Death of BURT LITTS, against RISLEY LUMBER COMPANY, Employer; TRAVELERS' INSURANCE COMPANY, Insurance Carrier

Death Case No. 513

(Decided January 2, 1918)

Injuries sustained by Burt Litts, resulting in his death, while employed as a stack painter by the Risley Lumber Company.

This case comes before the Commission for review on the application of the insurance carrier. On August 31, 1917, Burt Litts, a stack painter, while at work painting a smoke stack at the plant of his employer, fell to the ground because of the breaking of a rope. He lived only twenty minutes after his fall. The only question here is as to whether he was an employee or an independent contractor. Litts was to receive fifty dollars for his work in painting the stack from which he fell. He furnished the rope and his employer furnished the paint and also a helper. As the painting of the stack could not progress steadily on account of weather conditions the employer gave him work inside his plant at painting for which he was paid by the day. *Held*, that the fact that he was to be paid a certain lump sum for his services in painting the stack did not suffice to make him an independent contractor, and that the award should be confirmed.

An award has been made in this case in favor of the claimant and her two children for the death of Burt Litts on August 31, 1917, and the case now comes before the Commission for review on the application of the insurance carrier.

The employer's first report of injury in answer to the question, how the accident occurred, states, "He was a stack painter and his rope broke and let him fall. He lived only about twenty minutes after falling." It appears that the deceased and his family resided on a small farm in the vicinity of the employer's place of business, but that he was accustomed, when required, to work for people in the neighborhood where high-climbing was necessary. He had, before the time of his last employment by the Risley Lumber Company, painted a smoke stack once or twice for them, usually at day's wages. The arrangement for painting the stack upon which

he was working at the time of his accident was that he should be paid fifty dollars for his work. He, himself, furnished the ropes for the scaffolding. His employer furnished the paint and also one man to help him. The weather not being such that he could work at the painting of the stack all the time the employer gave him work inside his plant at painting, for which he was paid by the day.

There is no question but that the accident arose out of and in the course of the employment. The only question raised by the insurance carrier is whether he was an employee within the meaning of the Compensation Law, the claim being that his contract of hire placed him in the category of an independent contractor.

A. G. Patterson, for the claimant.

T. F. Hurley, for insurance carrier.

LYON, Commissioner.— The only ground for any claim that the deceased was an independent contractor is that he was to be paid a certain lump sum for his services. The testimony is that the fifty dollars was supposed to be fair compensation for the deceased's work at about his usual wages for such work. It will be noticed that not only did the employer furnish the material with which the painting was to be done, but the deceased did not and was not expected to himself employ any help, the necessary help being also furnished by the employer. I do not think the mere fact of a lump sum agreement being made instead of day's wages takes the workman out of the class of an employee within the meaning of the Compensation Law. The courts have held that piece workers, even those who take their work to their homes to do, are still employees within the meaning of the law, and I do not see why this case does not fairly come within the reasoning of such cases. While the deceased not infrequently did work of this kind it is to be noted that he did not make a special business of it, did not advertise himself as carrying on a separate business and only seems to have made the bargain in the present case on an estimated wage basis. I, therefore, advise that the award be confirmed.

In the Matter of the Claim of **RAYMOND J. CONNOLLY**, for Compensation under the Workmen's Compensation Law, against **TUCKER ELECTRICAL CONSTRUCTION COMPANY**, Employer; **THE EXCHANGE MUTUAL INDEMNITY INSURANCE COMPANY** and **ZURICH GENERAL ACCIDENT INSURANCE COMPANY**, Insurance Carriers

Claim No. 9217

(Decided January 2, 1918)

Injuries sustained by Raymond J. Connolly while employed by the Tucker Electrical Construction Company.

On January 4, 1917, Raymond J. Connolly, a resident of New York State, was injured at Waterbury, Conn., while employed by the Tucker Electrical Construction Company, a corporation having offices in New York State. The matter of his claim for compensation against the Exchange Mutual Indemnity Insurance Company was tried and an appeal therefrom taken to the Appellate Division of the Supreme Court, Third Department, where the award was reversed and the proceeding sent back to the Commission in order to have included in the record the two insurance policies which are the subject of the controversy, and to have additional findings made. The only question now before the Commission is whether the Exchange Mutual Indemnity Insurance Company or the Zurich General Accident Insurance Company, or both, shall be held as the insurance carrier. *Held*, that the Commission is without jurisdiction to determine the rights as between the two insurance carriers because the one is before us under a New York Workmen's Compensation policy, over which we have jurisdiction, and the other is before us with reference to a liability under a Connecticut policy, which we have no jurisdiction to interpret or apply. The award should be made against the employer and the Exchange Mutual Indemnity Insurance Company and findings be prepared in accordance with this opinion following the mandate of the Appellate Division.

The claimant is a resident of the State of New York, was hired in the State of New York by the Tucker Electrical Construction Company, having offices in the State of New York, and was injured at Waterbury, Conn., on January 4, 1917. An award for compensation was made against the employer and the Exchange Mutual Indemnity Insurance Company, from which an appeal

was taken to the Appellate Division of the Supreme Court, third department, where the award was reversed and the proceeding sent back to the Commission for the purpose of having included in the record the two insurance policies which are the subject of the controversy, and of making additional findings. There is no question but that the injured employee is entitled to compensation and that the award must be made against the Tucker Electrical Construction Company.

The only question is whether the Exchange Mutual Indemnity Insurance Company or the Zurich General Accident Insurance Company, or both, shall be held as the insurance carrier.

Claimant in person.

C. S. Bostwick, for Exchange Mutual Indemnity Company.

E. W. Helm, Jr., for Zurich General Accident and Insurance Company.

LYON, Commissioner.—On February 5, 1916, the Casualty Company of America issued its policy of compensation insurance to the Tucker Electrical Construction Company in which it gave the location of its factory, shops, yards, buildings, premises and other work places as the State of Connecticut. In a rider attached, and bearing the same date, under the head of "Declarations," the following was contained: "This policy shall cover the entire liability imposed upon or accepted by the assured under the laws of the state of Connecticut, Approved, May 29, 1913, entitled, An Act concerning compensation to workmen injured in the course of their employment."

A somewhat similar rider is also attached again limiting the operations covered by the policy to the State of Connecticut. The policy itself recites that, "The Casualty Company of America does hereby agree with the employer * * * (1) To pay in the manner provided by the Workmen's Compensation Law and all amendments thereto of any state named in the Declarations hereinafter set forth," etc.

This policy purports on its face to have been issued at the city of St. Louis, Mo., but it is admitted in the record that it was in fact issued in the State of New York. The proofs are that the payroll, which was the subject of audit for the purpose of fixing the premium for the policy of the Casualty Company of America, contained the name and remuneration of the claimant herein, so that the Casualty Company of America in fact was paid for carrying the risk under which Mr. Connolly received his accident. On December 1, 1916, the Zurich General Accident and Insurance Company reinsured the risk covered by this policy. On the 6th day of February, 1916, the Exchange Mutual Indemnity Insurance Company issued its policy to the Tucker Electrical Construction Company covering its employees generally. As already stated, the question is under which policy of insurance can this Commission award compensation, it being conceded that compensation must in any event go against the employer.

It will be noticed that the policy of the Casualty Company of America, to whose rights and obligations the Zurich General Accident Insurance Company has succeeded, is not the standard form used in New York, since it limits the scope of its coverage to "any state named in the declarations" and that the declarations set forth in the policy fixed the State of Connecticut as the place of operation. I think it must be held, therefore, that the policy of the Casualty Company of America was a Connecticut policy and though it was issued in the State of New York and very probably might be enforced in the courts of this State, I do not see where this Commission gets any authority to enforce it. The Commission's jurisdiction in that behalf seems to be limited to enforcing compensation under the Compensation Law of the State of New York. I suppose, too, it is perfectly possible and proper for a corporation to take out insurance for its employees in another State under the laws of that State, so that there is nothing irregular in the attempt of the Tucker Electrical Construction Company to cover its employees in the State of Connecticut under the Connecticut law.

On the other hand, the policy of the Exchange Mutual

Indemnity Company specifically provides that it will "pay in the manner provided by the New York Workmen's Compensation Law and all amendments thereto any sum due or to become due from the employer," etc. This policy being written in the State of New York to cover a resident of New York who was hired in New York, gives compensation to the injured employee wherever his accident occurs, following the decision of the Court of Appeals in the case of *Post v. Burger*, 216 N. Y. 544. That the Exchange Mutual Indemnity Insurance Company did not as matter of fact take into consideration the pay of the injured employee in fixing its premium, while the Casualty Company of America did, cannot deprive the injured workman of the right to hold the insurance carrier for the coverage which its policy clearly gave him. So far as the injured workman is concerned, neither he, nor the Commission, is concerned with the injustice of placing the loss upon one insurance carrier where the other insurance carrier received the premium.

The situation, as I view it, is that the Exchange Mutual Indemnity Insurance Company is the one and the only one which this Commission has jurisdiction to hold for coverage to this injured workman. It does not, however, follow that the way is not open to this insurance carrier to recoup its loss, either in whole or in part, from the other insurance carrier, who appears clearly to have contracted with the employer to cover the risk in Connecticut. It would undoubtedly be true that the injured man, if he had sought compensation in the State of Connecticut, could have recovered his compensation from the Zurich, and this brings me to the consideration of a clause found in both policies of insurance, which is as follows:

"Condition K.—In case of the payment of loss and expense under this policy, the Company shall be subrogated to all the rights of the employer or any employee or dependent covered hereby to the extent of such payment, and the employer shall execute all papers required and shall co-operate with the Company to secure its rights."

If we were a court of general jurisdiction, it is quite probable

[Vol. 14]

State Industrial Commission

that the relief which the Exchange Mutual Indemnity Insurance Company conceives itself to be entitled to could be given by us, and it is altogether likely that in an action in our Supreme Court between that company and the Zurich General Accident Insurance Company, the latter company would be held to reimburse the Exchange Mutual Indemnity Insurance Company in full, on the basis of its having been specifically paid to carry the risk on account of the injured employee's payroll being considered in fixing its premium, or at all events that the risk would be held to have been covered by two companies which should prorate the loss. Be that as it may, it is very clear to me that this Commission is without jurisdiction to determine the rights as between the two insurance carriers, because the one is before us under a New York Workmen's Compensation policy, over which we have jurisdiction, and the other is before us with reference to a liability under a Connecticut policy which we have no jurisdiction to interpret or apply. I, therefore, advise that the award be made against the employer and the Exchange Mutual Indemnity Insurance Company, and that findings be prepared in accordance with this opinion following the mandate of the Appellate Division.

In the Matter of the Claim of EDWIN B. HUNGERFORD, for Compensation under the Workmen's Compensation Law, against SAMUEL BONN, Employer; STANDARD ACCIDENT INSURANCE COMPANY, Insurance Carrier

Claim No. 25417

(Decided January 2, 1918)

Injuries sustained by Edwin B. Hungerford while employed as a plasterer by Samuel Bonn.

The question here involved is as to whether the claimant at the time of the injury was an independent contractor or an employee. The matter was heard and an award made by a Deputy Commissioner but his decision was subsequently rescinded, additional testimony taken and the case now comes on for decision as though no award had been made.

The employer, Samuel Bonn, is a general contractor on State roads, bridges and other public improvements. It was also a part of his regular business to purchase real estate where the buildings were in disrepair and to overhaul and remodel such buildings and place the properties on the market for profit. Claimant was working at the time of his injury in a house of this sort where his employer had taken the title in the name of his wife. The claimant had taken the contract to do certain work in the house of Mrs. Bonn at a given price, had completed the job and been paid for it. Mr. Bonn afterwards requested claimant to do some papering and painting in certain of the rooms and the claimant began to do this later work as an employee, being paid by the day, Bonn also giving him the money to pay for a helper. While at this work and repairing plaster on a ceiling, a particle of plaster dropped in claimant's right eye, resulting in the permanent loss of useful vision. *Held*, that the same person may be at one time an independent contractor and at another time an employee within the meaning of the Workmen's Compensation Law. In doing painting and papering after a contract deal had been finished and paid for claimant was clearly acting as an employee. The decision as made by the Deputy Commissioner is approved, and an award made.

The employer's first report of injury states that the employer's business is "business contractor;" that the occupation of the injured was "plasterer," and the description of the accident is as follows: "Insured party was repairing plaster on the ceiling when particle of plaster dropped in his eye." The attending physician's report states the nature and extent of the injury, "Lime burn of right eye. Has the injury resulted in a permanent disability? Yes. If so, what? Loss of useful vision. Vision at present is 10/200 in right eye." The physician also states that the injury is permanent.

It appears that the employer is a general contractor frequently taking contracts for the making or repairing of State roads, bridges and other public improvements. He also makes it a part of his regular business to purchase real estate upon which the buildings are in a state of disrepair, overhauling and remodeling the buildings for the purpose of placing the same on the market for profit. This latter is a very considerable part of the employer's business. The house in which the claimant was working at the time of his injury was a house of this kind to which the employer had taken the title in the name of his wife. The

claimant is in the habit sometimes of taking plastering jobs to do under a contract and often also works for different employers by day's work. He had taken a contract to do certain work in the house of Mrs. Bonn for one hundred and seventy-five dollars, and had completed that job and been paid for it. The building itself was an old one-family house which Mr. Bonn had converted into apartments, there being three or four apartments in the building. In one of these apartments Mr. Bonn and his wife were expecting to live after the alterations were complete, and in fact had moved in at the time of the accident, although the alterations were not entirely completed. The claimant having completed his contract job, was asked by Mr. Bonn to do some papering and painting in the parlor of the apartment which Bonn and his wife were about to use. The claimant started to do the work as an employee, rather than as a contractor, and, inasmuch as Mr. Bonn wished the work done as rapidly as possible, procured the assistance of another man and the two were working at the time of the accident. The money paid to the claimant for his own work was four dollars and eighty cents per day, and he also was paid for the work of his helper at the same rate, although he himself paid the helper but four dollars per day. The extra eighty cents per day paid Hungerford for the helper is said by both himself and the employer to be to cover the expense for brushes and other implements which were used on the job and which wear out or deteriorate rather rapidly. The employer carried a policy of insurance in the Standard Accident Insurance Company which was written on the standard form of policy approved by the Superintendent of Insurance and acceptable as evidence of insurance by the State Industrial Commission. In his application for insurance the employer gave the following as the location of the plants where operations would be conducted: "Sandy Creek, Oswego, New York," and the kind of trade, business, profession or occupation carried on, as "State or municipal road or street making, including culverts not exceeding 10 ft. span: all operations except quarrying and blasting." Among the declarations contained in this policy were the following: "(m) Employees

engaged in the repair, alteration and construction of buildings, structures or plants (except machinery), None."

The policy was issued in pursuance of these declarations and the declarations were annexed to and formed a part of the policy. It is stated by the employer and not denied by the insurance carrier that although the work upon the building where Mr. Hungerford was injured was not in terms covered by the policy, still the insurance company on its payroll audit took in the payroll of the men working upon this building and that in fact the pay of the claimant formed a part of the basis for the fixing of the premium for the policy.

The insurance carrier resists payment on three grounds:

First. That the claimant was an independent contractor and not an employee of Bonn within the meaning of the Workmen's Compensation Law;

Second. That the work which the claimant was performing at the time of his injury was not being carried on by his employer for pecuniary gain within the meaning of the Compensation Law, and

Third. That the policy of insurance did not in any event cover the claimant while working upon the building in question.

An award was made by a Deputy Commissioner who heard the case, but was subsequently rescinded, additional testimony taken and the case now comes on for decision as though no award had been made.

William J. McClusky, attorney for employer.

F. D. Pierson and J. M. Henry, attorneys for insurance carrier.

LYON, Commissioner.—I think it perfectly clear that the same person may be at one time an independent contractor and at another time an employee within the meaning of the Workmen's Compensation Law. There is no question but that the claimant in this case at times took contracts in such form as to put himself in the category of independent contractor, and at other times

worked under conditions which could place him nowhere except in the category of an employee. There is nothing in the present case that would militate against the claimant's contention that he was an employee of Bonn, except the fact that he had working with him another man for whose labor and tools the claimant received slightly more pay per day than he paid the workman. There is apparently no other feature in the case which would even look like an independent contracting. I think the explanation given that the use of brushes and other tools of the claimant by the employee in question was a sufficient ground for making a slightly larger charge for his daily wage than was paid this employee, and it seems to me that the Rheinwald case is ample authority for holding that the claimant in this case was an employee and not an independent contractor. I am perfectly well aware that the Rheinwald case was ultimately overthrown on the ground that the Bargey case was controlling, but the court's decision finally denying an award in the Rheinwald case did not disturb its prior decision on the question here under consideration.

I am also of the opinion that Mr. Bonn was making the alterations in the house in question for pecuniary gain, within the meaning of the Workmen's Compensation Law. In fact the title to the house was not in the employer's name at all, but I am not disposed to put great weight upon this fact, because apparently the title was taken in the name of Mrs. Bonn as a matter of business convenience. Nevertheless it is true that the ownership of the property was in a different individual than the person who assumed the position of employer. The real point of the case, however, in my mind, lies in the fact that it was a part of the regular business of the employer to buy old and partially dismantled houses, remodel and reconstruct them for the purpose of selling, and this was precisely the thing which he had done with the house in question, turning it from a one-family house into a three-family house and, as he said, he was ready to sell it at any time if a favorable opportunity presented itself. The fact that he was contemplating using one of the apartments for

himself and for the time being had some of his goods in the room where the accident occurred, did not differentiate this house from other houses of a similar character which the employer was in the habit of buying and selling. I think the purchase, remodeling and sale of houses was a part of the regular business of the employer.

We now come to a question rather difficult of decision, namely, whether under the circumstances here set forth the policy of insurance can be held to have covered the claimant. There are two forms of compensation policies which are approved by the Superintendent of Insurance and acceptable as evidence of insurance by the Industrial Commission. In one of these forms provision is made for restricting coverage to a single plant or plants of an employer. The other form of policy is general and is intended to cover all employees of the same employer, no matter where employed. In the present instance the latter form of policy was used. We are also to bear in mind that insurance for compensation does not follow the same lines as other kinds of insurance. The insurance of compensation is made compulsory by the Legislature and in fact the Compensation Law itself forbids an ordinary insurance company to write liability insurance without also covering employees for compensation insurance. The Compensation Law also has for its basis a desire to cover workmen as well as insure employers. This, I think, is quite manifest from section 90 of the act establishing the State fund which provides in part as follows: "There is hereby created a Fund to be known as the State Insurance Fund for the purpose of insuring employers against liability under this chapter, and of assuring to the persons entitled thereto the compensation provided by this chapter."

The courts have held that the State fund is the primary source of insurance and that all other compensation insurance is a permitted substitute thereof. We must assume, therefore, I think, that just as the State fund is designed among other things "to assure to persons entitled thereto the compensation provided by

this chapter," so it is the purpose of all other permitted forms of compensation insurance.

Still further, the law provides that the Commission may make parties to the proceeding both the employer and the insurance carrier, so that an award in a proper case may be made in favor of the claimant and against both the employer and insurance carrier, thus making all three parties to the proceeding and giving all three, as well as the Commission, a proper standing for a review of the Commission's award on appeal. These provisions of the Compensation Law, in my opinion, establish a privity between the insurance carrier and the employee of the assured. This being so, I am of the opinion that the employees have some rights of protection at the hands of an insurance company which cannot be abrogated by a provision of the contract of insurance without the employee's knowledge or assent. Moreover, the policy of insurance itself contains the following provision:

"6. This policy shall cover only employees of the employer legally employed whose remuneration is included in said declarations, but nothing in this policy shall be construed as excluding any employee who may become entitled to compensation under the provisions of the New York Compensation Law and all amendments thereto, all of whom shall be expressly included."

While it is true that the first portion of this section in terms would apply only to employees "included in said declarations," I think this provision looks rather toward the employer and is designed to stimulate the employer to disclose completely to the insurance company before the policy is issued, all his employees who are deemed to be covered. The portions of this clause which expressly include all employees must be held to cover employees who may be omitted from the declarations by the employer. This, it seems to me, is what the policy means, whether the insurance carrier has had the payroll of the injured employee included in the employer's payroll for the purpose of fixing the premium or not, but in the present case the proof is that the insurance carrier actually did include in the payroll audit the payroll of the injured employee, and, therefore, was specifically

paid for carrying the risk which resulted in the claimant's injury.

Although the questions are all rather close, I think they must all be decided in favor of the injured employee and I, therefore, agree with the decision first made by the Deputy Commissioner and advise that an award be made.

In the Matter of the Claim of FRANCES A. CARMAN, Widow, for Compensation under the Workmen's Compensation Law for the Death of WILLIAM R. CARMAN, against LOPER BROTHERS, Employer; LUMBER MUTUAL CASUALTY INSURANCE COMPANY, Insurance Carrier

Case No. 46768

(Decided January 2, 1918)

Injuries sustained by William R. Carman, resulting in his death, while employed as a yard foreman by Loper Brothers.

On May 29, 1917, William R. Carman, while employed by Loper Brothers, lumber dealers at Port Jefferson, N. Y., as a yard foreman, started to have unloaded a closed car of lumber which had come to their yard. The car was so full that it could not be unloaded from the outside. Carman went into the car to start the unloading. To do this he had to lie on his back in the car and remove the lumber as best he could in that position. In so doing he strained himself and suffered an injury from one of the sticks of timber falling across his abdomen. He worked the remainder of that day but not the next and thereafter worked very irregularly, and never again performed any labor. He had been in fair health up to the time of the accident. On August eighteenth he died. The insurance carrier resists the claim for compensation on the ground of want of proof of the accident and that the death has not been traced with reasonable certainty to such accident. *Held*, that the testimony showed that the claimant, from being a man in fair health, found himself immediately after the accident very nearly incapacitated and continuing to grow worse daily until his death two and one-half months after his injury. The Commission has warrant in finding that the death has been traced with reasonable certainty to the accident. An award was made.

The claimant is the widow of William R. Carman, who died on August 18, 1917, as the result, it is claimed, of an injury sustained by him while in the employ of Loper Brothers on the 29th day of May, 1917. Loper Brothers were lumber dealers at Port

[Vol. 14]

State Industrial Commission

Jefferson, N. Y., and the deceased was a foreman in their yard. It appears that on the twenty-ninth day of May, a load of lumber consisting of spruce sticks two by four inches, two by six inches and two by eight inches, and from ten to sixteen feet in length, had come to Loper Brothers in a closed car. The car had been filled with this lumber so full that it was impossible to start unloading it from the outside, and Mr. Carman went into the car to start the unloading. He was compelled, in order to work at all, to lie on his back in the car and remove this lumber as best he could in that reclining position. It is claimed that while doing so he strained himself and that he also suffered an injury from one of the sticks of timber falling across his abdomen. He worked the remainder of that day, but not the next day. He worked most of the following week, when he ceased work, and with the exception of a few days subsequently, when he worked, he never again performed any labor. The testimony is, that he was in apparently fair health and worked with substantial regularity up to the day of the accident. He died on August eighteenth. The physician who attended him claims that he found a hematoma, that is, a blood clot at one side of the abdomen, but it does not appear whether this hematoma was malignant or not. The doctor had suspected that the deceased was afflicted with cancer of the stomach. There was some question as to the rate of wages, owing to the fact that Mr. Carman received, in addition to his wages, the rent of a house and the use of a garden, but on the hearing it was practically agreed that in case the claimant is entitled to compensation at all, the rate of wages should be twenty-one dollars and seventy-three cents per week, for the purpose of fixing the compensation. The insurance carrier resists the claim on the ground that there is no sufficient proof of the accident and that, in any event, the death has not been traced with reasonable certainty to the accident.

Thomas K. Patterson, for claimant.

F. Thompson and Jeremiah F. Connor, for insurance carrier.

LYON, Commissioner.—The insurance carrier claims that the proof of an accident in this case consists entirely of hearsay evi-

dence and that under the rulings of the Court of Appeals in the case of Carroll v. Knickerbocker Ice Company, 218 N. Y. 435, this is not sufficient proof to warrant an award.

Of course if there be no direct testimony and no attendant circumstances to support the hearsay testimony, the claim of the insurance carrier must be sustained, and it, therefore, becomes necessary to look with some care to the exact proofs in the case. The claimant, the widow of deceased, testified as follows: "It was Tuesday he was hurt. I came home Friday afternoon. Q. What shape did you find him in when you got there? A. He said he had been badly hurt. Q. What did he say happened to him? A. That he got hurt in the car. Q. How? A. Up on his back, raising his hand and trying to loosen the lumber; and he also told me there was a stick fell across him. Q. Where? In the car? A. In the car while he was on his back. Q. What complaint did he make — what did it do to him? A. He was sprained and sore all over and all in his heart and down in his ribs."

Dr. R. J. Russell said that he was called to see the deceased on the eighth day of June. He testified as follows: "Q. What did he tell you when you first went to see him? A. He complained of pain in his chest and couldn't keep anything on his stomach in the morning. Q. What did he tell you caused it? A. Why, he didn't tell me that day. Q. Did he ever tell you? A. About a week after that. Q. What did he tell you then? A. He told me he was working in a car with lumber and at the beginning of the unloading he got a stick across his stomach and it pinned him fast. He said he didn't work for some time — any how he complained this stick fell across his stomach and he complained of pain ever since."

Of course this evidence is hearsay and must be weighed with a good deal of care. I think it somewhat significant that what he told his doctor and what he told his wife was made in the comparatively short time after the accident and apparently without any idea whatsoever that it would ever be used in a compensation hearing, because it appears that the employer kept him on the payroll and paid his wages continuously up to the time of his

